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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

FRANK A. TURNER
REPORTER

VOLUME 82

**DECISIONS RENDERED BETWEEN NOVEMBER 21, 1916, AND
FEBRUARY 6, 1917**

SAN FRANCISCO
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1917

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IN THE

STATE OF OREGON

February 6, 1917.

First Judicial District—

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Josephine		
Lane	}	GEORGE F. SKIPWORTH, Eugene.
Lincoln		

Second Judicial District—

Coos	}	JOHN S. COKE, Marshfield.
Curry		
Douglas	}	JAMES W. HAMILTON, Roseburg.
Benton		

Third Judicial District—

Linn	}	PERCY R. KELLY, Department No. 1, Albany.
Marion		GEORGE G. BINGHAM, Department No. 2, Salem.

Fourth Judicial District—

Multnomah	}	JOHN P. KAVANAUGH, Department No. 1, Portland.
		ROBERT G. MORROW, Department No. 2, Portland.
		ROBERT TUCKER, Department No. 3, Portland.
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Sixth Judicial District—

Morrow	}	GILBERT W. PHELPS, Pendleton.
Umatilla		

Seventh Judicial District—

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Wasco		

Eighth Judicial District—

Baker	GUSTAV ANDERSON, Baker.
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Ninth Judicial District—

Grant	}	DALTON BIGGS, Ontario.
Harney		
Malheur		

Tenth Judicial District—

Union	}	JOHN W. KNOWLES, La Grande.
Wallowa		

Eleventh Judicial District—

Gilliam	}	DAVID R. PARKER, Condon.
Sherman		
Wheeler		

Twelfth Judicial District—

Polk	}	HARRY H. BELT, Dallas.
Yamhill		

Thirteenth Judicial District—

Klamath.....	DELMON V. KUYKENDALL, Klamath Falls.
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Fourteenth Judicial District—

Lake.....	L. F. CONN, Lakeview.
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Fifteenth Judicial District—

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Jefferson.....		

Sixteenth Judicial District—

Tillamook.....	}	GEORGE R. BAGLEY, Hillsboro.
Washington.....		

Seventeenth Judicial District—

Clatsop.....	}	JAMES A. EAKIN, Astoria.
Columbia.....		

DISTRICT ATTORNEYS

IN THE

STATE OF OREGON

February 6, 1917.

County.	Name.	Official Address.
Baker.....	Levens, W. S.	Baker
Benton.....	Clarke, Arthur.....	Corvallis
Clackamas.....	Hedges, Gilbert L.....	Oregon City
Clatsop.....	Erickson, J. O.	Astoria
Columbia.....	Metsker, Glen B.	St. Helens
Coos.....	Hall, John F.	Marshfield
Crook.....	Wirtz, Willard	Prineville
Curry.....	Buffington, Collier H.	Gold Beach
Deschutes.....	DeArmond, H. H.	Bend
Douglas.....	Neuner, George, Jr.	Roseburg
Gilliam.....	Weinke, T. A.....	Condon
Grant.....	Ashford, Phil	Canyon City
Harney.....	Biggs, M. A.	Burns
Hood River.....	Derby, A. J.....	Hood River
Jackson.....	Roberts, G. M.	Medford
Jefferson.....	Boylan, Bert C.	Metolius
Josephine.....	Miller, W. T.....	Grants Pass
Klamath.....	Duncan, William M.....	Klamath Falls
Lake.....	McKinney, T. S.	Silver Lake
Lane.....	Ray, L. L.	Eugene
Lincoln.....	Hawkins, Calvin E.	Toledo
Linn.....	Hill, Gale S.....	Albany
Malheur.....	Swagler, B. W.	Malheur
Marion.....	Gehlhar, Max	Salem
Morrow.....	Notson, Samuel E.....	Heppner
Multnomah.....	Evans, Walter H.....	Portland
Polk.....	Piasecki, E. K.	Dallas
Sherman.....	Huddleston, O. M.....	Wasco
Tillamook.....	Goynes, T. H.	Tillamook
Umatilla.....	Keator, R. I.	Pendleton
Union.....	Hodgin, John S.	La Grande
Wallowa.....	Fairchild, Abijah	Enterprise
Wasco.....	Galloway, Francis V.	The Dalles
Washington.....	Tongue, E. B.....	Hillsboro
Wheeler.....	Starr, J. K.....	Fossil
Yamhill.....	Conner, Roswell L.	McMinnville

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CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Motion to dismiss appeal denied July 27, 1915.
(Argued on the merits September 26, reversed November 21, 1916.)

EVERDING & FARRELL v. TOFT.*

(150 Pac. 757; 160 Pac. 1160.)

Appeal and Error—Decisions Reviewable—Part of Judgment.

1. Sections 549, 550, L. O. L., declare that any party to a judgment or decree, not rendered by confession or for want of an answer, may appeal therefrom, or from some specified part. In an action on a note brought against several, the answers of the several defendants raised different issues. There was judgment in favor of one of the defendants and against the others. *Held* that, while the statute does not authorize a party to maintain separate appeals from different parts of a judgment, yet in such case plaintiff might appeal from that part of the judgment in favor of one of the defendants.

Bills and Notes—Indorsement—Rights of Holders.

2. The perpetration of fraud will not alone defeat the holder of a negotiable instrument, but it must be supplemented by a notice to the holder.

Bills and Notes—Indorsement—"Holder in Due Course."

3. Under Section 5885, L. O. L., defining a holder in due course, a person is not a holder in due course if he does not take the note in

*As to the question of evidence of fraud or illegality in the inception of the instrument, see notes in 10 L. R. A. (N. S.) 679; 17 L. R. A. 328; 36 L. R. A. 434.

As to effect of exchange of commercial title to constitute one a holder in due course for value, see note in 17 L. R. A. (N. S.) 747.

Upon the question as to what knowledge of consideration by purchaser of a note which did not indicate the nature of its consideration is required by statute, see notes in 24 L. R. A. (N. S.) 1057; 29 L. R. A. (N. S.) 351; 42 L. R. A. (N. S.) 395.

REPORTER.

good faith without notice of any infirmity in the instrument or affecting the title of the person negotiating it.

Bills and Notes—Indorsement—Notice of Defects.

4. A person who takes a note has notice of an infirmity in the instrument or defect in the title if he had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Bills and Notes—Indorsement—Bad Faith of Indorsee—"Negligence"—"Bad Faith."

5. While negligence is not synonymous with bad faith, yet where a person takes a note under suspicious circumstances and, having means of knowledge, willfully abstains from making inquiries, his intentional ignorance may result in bad faith.

[As to parol evidence to vary effect of indorsement, see note in 7 Am. St. Rep. 366.]

Bills and Notes—Actions—Questions for Jury.

6. The question of good or bad faith of the holder of a note is peculiarly for the jury and not for the court, especially when the burden rests on the holder to show that he became the holder in due course.

Bills and Notes—Actions—Burden of Proof.

7. Under Section 5892, L. O. L., providing that when it is shown that the title of any person who has negotiated an instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired title as a holder in due course; when a note had its origin in fraud, the burden is on the owner to prove that he or some person under whom he claims was a holder in due course.

Bills and Notes—Actions—Admissibility of Evidence.

8. In an action by an indorsee on a note for \$5,000, evidence that the plaintiff acquired the note for \$4,000 is admissible, especially in connection with information received by plaintiff as to one indorser and inquiries made or omitted concerning other indorsers and the maker, as bearing on the question whether the holder was chargeable with bad faith.

Bills and Notes—Actions—Admissibility of Evidence.

9. A person may resort to circumstantial evidence to show that the owner of a negotiable instrument is not a holder in due course.

Bills and Notes—Actions—Question for Jury.

10. In an action by an indorsee on a note, evidence held to present a question for the jury as to the good faith of the plaintiff.

Bills and Notes—Actions—Issues and Proof.

11. Where a complaint on a note charges a defendant with being an indorser in due course of business, he cannot be held liable as a maker or guarantor.

Bills and Notes—Liabilities of Parties—"Primarily Liable"—"Secondarily Liable."

12. Under Section 6023, L. O. L., providing that the person who by the terms of an instrument is absolutely required to pay is primarily

liable and all other parties are secondarily liable, the maker of a note is primarily liable while the indorser is secondarily liable.

Bills and Notes—Indorsement—"Discharge" of Indorser.

13. Section 5953, subdivision 3, L. O. L., declaring that a person secondarily liable on an instrument is discharged by discharge of a prior party, applies only to a discharge by act of the creditor, and does not include discharges by operation of law, nor where, after a trial on the merits, the note is destroyed because of a vice inherent in the transaction.

Bills and Notes—Actions—Instructions.

14. Where, after a trial on the merits, it is determined that because of fraud and notice there is no subsisting debt of the maker of a note, there is no debt of an indorser, and it is error to instruct that there may be a verdict in favor of the maker, but against the indorser.

From Multnomah: **CALVIN U. GANTENBEIN**, Judge.

This is an action by Everding & Farrell, a corporation, against John F. Toft, J. L. Hoffman and others. There was a judgment in favor of plaintiff against John F. Toft, and one against plaintiff in favor of J. L. Hoffman for his costs and disbursements. From that part of the judgment in favor of defendant Hoffman, plaintiff appeals. Respondent files motion to dismiss the appeal.

MOTION DENIED.

Mr. Alfred E. Clark and Mr. Malcolm H. Clark, for the motion.

Messrs. Reed & Bell, contra.

Opinion by **MR. CHIEF JUSTICE MOORE.**

This is a motion to dismiss an appeal. In order to understand the question involved, it is necessary to state the substance of the facts upon which a solution of the inquiry depends:

The defendant J. L. Hoffman on August 7, 1912, executed to the defendant the Colombian Timber Company, a corporation, his promissory note for \$5,000, payable in one year, with interest at the rate of 8 per

cent per annum. Prior to the maturity of the instrument the defendants John F. Toft, John F. Shorey and the payee in due course indorsed the note for value, and thereupon the plaintiff Everding & Farrell, a corporation, became the owner thereof and instituted an action to recover the amount due thereon; the complaint being in the usual form. Toft, separately answering, denied some of the averments of the initiatory pleading, and for a further defense alleged that he was induced to indorse the note by the fraudulent representations of an agent of the payee, setting forth the statements asserted to be false; that before the plaintiff obtained title to the instrument one of its officers, naming him, was informed by Toft that there was something wrong about the making and indorsing of the note, and advised not to purchase it expecting this defendant to pay the same. The statements of new matter in this answer were denied in the reply.

The defendant Hoffman, separately answering, admitted most of the averments of the complaint, and further alleged that he was induced to execute the note to evidence the purchase of 5,000 shares of the capital stock of the defendant corporation, which its agent fraudulently represented was valuable, but in fact was valueless, and that prior to plaintiff's purchase of the written promise its officer was informed of the invalidity thereof, by reason of false statements, setting them out. A reply put in issue the averments of new matter in this answer.

The defendants, the Colombian Timber Company and John F. Shorey, did not appear or answer. The cause being tried on the issues joined, the plaintiff secured a judgment against Toft for the amount of the note, while the defendant Hoffman obtained a judgment against the plaintiff for his costs and disburse-

ments. The plaintiff's attorneys served upon the defendants Toft and Hoffman a notice of appeal, which, omitting the title and the signatures, is as follows:

"You, and each of you, will please take notice that an appeal is taken by Everding & Farrell, the above-named plaintiff, to the Supreme Court of the State of Oregon from a part of that certain judgment made and rendered in the Circuit Court of the State of Oregon for the county of Multnomah on the 8th day of February, 1915, in that certain cause entitled 'In the Circuit Court of the State of Oregon for the County of Multnomah. Everding & Farrell, Plaintiff, v. John F. Toft, Colombian Timber Company, a Corporation, J. L. Hoffman, and Jno. F. Shorey, Defendants, D. 7423.' The part of the judgment from which the appeal is taken to the Supreme Court of the State of Oregon is specified in words and figures as follows, to wit: 'It is further ordered and adjudged that the plaintiff take nothing herein of or from the defendant J. L. Hoffman, and that the defendant J. L. Hoffman recover of and from the plaintiff his costs and disbursements herein, and that execution issue therefor.' "

The transcript having been filed in this court, counsel for the defendant Hoffman have interposed a motion to dismiss the appeal, on the grounds that a review of a part of the judgment only cannot legally be upheld, and that an execution on the judgment against Toft has been issued whereby some of his property has been sold and the proceeds thereof paid over to plaintiff.

Any party to a judgment or decree that was not given or rendered by confession or for want of an answer may appeal therefrom, "or some specified part thereof": Sections 549, 550, L. O. L. In construing these sections of the statute it has been held that a party will not be permitted to maintain separate ap-

peals from parts of a judgment or decree. An apparent exception to this rule is recognized whereby an appeal will lie from a part of a judgment or decree, when an issue distinct, entire and complete has been formed between some of the parties, and upon which issue a final judgment or decree has been given, affecting only the interests and rights of the parties to that particular issue: *Bush v. Mitchell*, 28 Or. 92 (41 Pac. 155).

In the case at bar it will be remembered that distinct issues were made by the separate answers of Toft and Hoffman. Based on these issues, judgments were rendered, which final determinations, as between Toft and Hoffman, were as well defined as though they had been given in separate actions; and, this being so, the plaintiff could appeal from that part of the judgment specified in its notice. No appeal having been taken by the plaintiff from the judgment rendered against Toft, an estoppel cannot arise from any proceedings undertaken to enforce the determination as against him.

The motion must therefore be denied; and it is so ordered.

MOTION TO DISMISS DENIED.

Reversed November 21, 1916.

ON THE MERITS.

(160 Pac. 1160.)

Department 2. Statement by MR. JUSTICE HARRIS.

The Colombian Timber Company is a corporation, and it will be mentioned by its name or as the timber company. Everding & Farrell is likewise a corpora-

tion, but it will be referred to either by its corporate name or as the plaintiff. The Colombian Timber Company sold 5,000 shares of its capital stock to J. L. Hoffman who paid for it by executing a note for \$5,000 dated August 7, 1912, payable one year after date to the order of the timber company at the Merchants' National Bank of Portland, Oregon. Everding & Farrell purchased the note, on September 13, 1912, from the Colombian Timber Company for \$4,000. When the paper was delivered to the plaintiff it bore the indorsements of John F. Toft, the Colombian Timber Company and John F. Shorey in the order named. Payment having been demanded and refused, the paper was protested, and the plaintiff then commenced this action to recover the full amount of the note, naming as defendants J. L. Hoffman, the maker, and John F. Toft, Colombian Timber Company and John F. Shorey, the indorsers. The timber company and Shorey defaulted. Hoffman and Toft filed separate answers, each claiming that the plaintiff purchased the note with knowledge of fraud. The complaint alleges that Hoffman executed and delivered the note, and that the paper was, "in due course of business, indorsed by the defendants J. F. Toft, the Colombian Timber Company, and John F. Shorey."

The defendant Toft defends by saying that W. E. Douglas, as agent for the corporation, came to him and "stated that the Colombian Timber Company was trying to raise some money by making a sale of said note, and as defendant John F. Toft was a business man on Front Street, in Portland, Oregon, that if he (Toft) would indorse said note that the Colombian Timber Company could readily sell the same." The answer continues by alleging that the corporation through its officers, and especially through its stock

salesman, W. E. Douglas, represented that it owned logging equipment and machinery which could not be duplicated for less than \$50,000, and that it owned a contract, "which will no doubt run into millions of dollars," to log and ship for a price of \$50 per 1,000 feet board measure upward of 5,000,000,000 feet of mahogany and Spanish cedar timber located on the Martello estate, in the United States of Colombia, South America, and that for the purpose of raising funds with which to install "its machinery on the ground and commence actual operations of logging and shipping under the terms of its contract," it was offering to sell 50,000 shares of its treasury stock. Continuing, the answer recites that while acting for the Colombian Timber Company, Douglas represented that it owned property which was reasonably worth \$50,000, and was free from encumbrances, and that Shorey was worth \$100,000, and that the Hoffman note was accompanied by a negotiable instrument for \$10,000 which was held as collateral security. After charging that all the representations were false and that he indorsed the note in reliance upon them, Toft alleges that the timber company offered to sell the Hoffman note to Everding & Farrell, and that afterward Thomas Farrell, who is a representative of the plaintiff, "interviewed the defendant John F. Toft as to the genuineness of said promissory note, and at said time the said Thomas Farrell asked [stated to] said John F. Toft that said note had been offered to him [Thomas Farrell] for \$4,000, or \$1,000 less than the face value thereof, and that he was thinking of purchasing the same, whereupon the defendant John F. Toft made the following statement to Thomas Farrell: 'If the Colombian Timber Company was offering you that note for \$1,000 less than the face of

the note there is something wrong with it. It certainly doesn't look good to me. You better investigate it further. There would be no occasion to sacrifice this note if the statements made to me by W. E. Douglas, the agent of this company, which were that the company had property of the reasonable value of \$50,000, and that John F. Shorey, the president of said company, was possessed of property of the reasonable value of \$100,000 were true. There is something radically wrong about this transaction. You better be careful. I am going to investigate the matter myself. Don't buy this note expecting me to pay it, I never will.' "

Toft avers that notwithstanding the warning and information given by him the plaintiff "thereafter went and purchased said promissory note from the Colombian Timber Company," and consequently with "due notice that the note and indorsement by the defendant John F. Toft had been procured by fraud."

The answer filed by Hoffman sets forth that the timber company made false representations, substantially the same as those made to Toft, concerning the logging equipment, the timber contract, and the purpose for which the treasury stock was to be sold, but he goes further and alleges that "John F. Toft was at the time acting as agent of said defendant corporation" in the sale of its corporate stock, and that he conspired with W. E. Douglas, who was a stock salesman and promoted the sale to Hoffman, to induce a purchase of the stock, and told Hoffman that Douglas was reliable, and that "he [Toft] had carefully examined into the said proposition of defendant corporation, its properties and the value thereof, that it owned the properties" represented to be owned by it, and "that he had invested of his own money in the corpo-

rate stock in the said corporation the sum of \$5,000," and "that said capital stock was worth the par value thereof"; and Hoffman then avers that Toft never invested any sum in the capital stock, and that the only stock ever received by him was as a commission for inducing Hoffman to buy the 5,000 shares. Hoffman says that he relied upon the fraudulent representations of the corporation, and also upon the statements made by Toft, and on that account purchased the stock and gave his note. After stating that the plaintiff had purchased the note at a discount of 20 per cent Hoffman then avers:

"That recently he has been informed, and therefore alleges the fact to be, that prior to the purchase of said note by plaintiff, plaintiff was warned that there was something wrong about the note, and advised to investigate the same; and that sufficient of the circumstances surrounding the transactions hereinbefore alleged was brought to the knowledge of the plaintiff, so that plaintiff was not and is not a purchaser for value in good faith, without notice of the facts hereinbefore set forth."

Plaintiff replied to both answers by denying any fraud or notice of the alleged infirmity in the note. A trial resulted in a verdict in favor of the defendant J. L. Hoffman, but at the same time the jury found for the plaintiff and against the defendant Toft for the full amount of the note. The plaintiff appealed from that part of the judgment which was favorable to Hoffman, while Toft appealed from that portion which is against him.

REVERSED.

For appellant, Everding & Farrell, there was a brief over the name of *Messrs. Reed & Bell*, with an oral argument by *Mr. C. A. Bell*.

For appellant, John F. Toft, there was a brief over the names of *Messrs. Malarkey, Seabrook & Dibble*, and *Mr. Walter G. Hayes*, with an oral argument by *Mr. Ephraim B. Seabrook*.

For respondent, J. L. Hoffman, there was a brief over the names of *Mr. Alfred E. Clark* and *Mr. Malcolm H. Clark*, with an oral argument by *Mr. Alfred E. Clark*.

MR. JUSTICE HARRIS delivered the opinion of the court.

The plaintiff appealed because the court: (1) Denied a motion to strike out all evidence relating to the charge of fraud; (2) refused to direct a verdict for the plaintiff; and (3) instructed the jury that "under the evidence in this case, you may find a verdict in favor of the defendant Hoffman, although you may find the plaintiff is entitled to recover against the defendant Toft." The appeal prosecuted by Toft is predicated upon the theory that the discharge of the maker of the note necessarily operates as a discharge of the indorser.

The nature of the questions involved in the two appeals makes it proper to take some notice of the testimony before attempting to discuss the assignments of error. The Colombian Timber Company issued a printed prospectus and employed W. E. Douglas to sell its capital stock. The prospectus stated that the timber company owned tools, machinery and equipment for logging, "and in fact complete equipment for the woods," which "could not be duplicated for less than \$50,000," and that "the company also owns the contract for logging the property of the Fearon & Martello Company, the value of which cannot be estimated,

but which will no doubt run into millions of dollars." The prospectus recited that the timber company "will engage in the business of logging mahogany and Spanish cedar timber exclusively, and by virtue of a logging contract which it holds covering upward of 5,000,000,000 feet of timber," and it is also represented that "the Colombian Timber Company offers for sale 50,000 shares of its treasury stock, fully paid and non-assessable, at par, \$1 per share. The funds realized from the sale of this stock will be used to install its machinery on the ground and commence actual operations of logging and shipping under the terms of its contract as hereinbefore set forth." The statements appearing in the prospectus were false. The timber company did not own any logging tools, machinery or equipment, nor did it own any logging contract. The Colombian Timber Company owned practically nothing except a few books and some stationery. According to the testimony of Hoffman his attention was first directed to the Colombian Timber Company by Toft who gave him a copy of the prospectus, "and explained that it was a great proposition to invest money in," and "that he was going to invest \$10,000 of his own money, and he thought if I wanted to put any money in, there was not a better proposition open." A few days afterward Toft introduced Hoffman to Douglas, and, according to the testimony of Hoffman, he was told by Toft that he could rely upon any statements made by Douglas. Hoffman and Douglas then went to the office of the timber company, and, after being assured by Douglas that the statements in the prospectus were true, Hoffman there, either at that time or three or four days afterward, gave his note in payment for the 5,000 shares of the capital stock which he purchased. A note payable to Hoffman was deliv-

ered to the timber company as collateral security. The next day a certificate for 500 shares of the capital stock was issued in the name of Toft and delivered at his place of business. Toft indorsed the note after it was delivered to the payee, and on August 9, 1912, he received from the Colombian Timber Company a certificate for 5,000 shares of its capital stock in payment for his indorsement.

The plaintiff buys and sells "grains, salmon and the like," and does not "make a business of buying and selling notes on the market," although it loans "a great deal of money." Everding & Farrell purchased the note from the Colombian Timber Company for \$4,000. Before buying the paper Thomas G. Farrell, who is the secretary of the plaintiff, and conducted the negotiations for the purchase of the note, made inquiries at a bank concerning the financial standing of Toft, and ascertained that the latter was "good for any amount to \$5,000"; he made no inquiries concerning the timber company, but was told that Shorey was "reputed to be worth a good deal of money"; he testified that he did not realize that the maker of the note was the defendant J. L. Hoffman, because he "always called him Joe," notwithstanding the fact that he had known Hoffman for many years and had "asked Mr. Toft who the man was, and he said he was a farmer out here somewhere"; and he also told the jury that the note was purchased because of the financial worth of Toft and without knowing whether the maker "had one dollar or a million."

Thomas G. Farrell had at least one and probably two conversations with Toft before purchasing the note. Toft testified that:

"Mr. Thomas Farrell came down and asked me if I indorsed a note to the Colombian Timber Company

for \$5,000. I stated that I had, and probably some other remarks were made, but nothing of any importance, and he went away. A few days later he came down and said they were offering the note for \$4,000. I said, 'Tom, if such is the case, there is something wrong.' The statement made to me by Mr. Douglas was that the company owned property valued at \$50,000, the president was worth \$100,000, the vice-president was worth from \$40,000 to \$60,000, and that they were holding as collateral security a note for \$10,000, and that if those facts were true, there would be no occasion to sell that note for \$4,000, and he had better look into the matter; that I certainly should do it. * * "

Continuing, the witness also stated that before leaving Farrell said, "John, I might possibly have to call on you to pay the note"; and Toft replied by saying, "Tom never buy that note thinking I will ever pay it." Farrell denies the conversation as related by Toft, but the version given by the former need not be stated because the inquiry is now directed to whether there was any evidence to take the case to the jury.

Two or three months after the execution of the note Hoffman received a pamphlet which the timber company had recently issued, and upon noticing that no reference was made to logging equipment he went to the office of the Colombian Timber Company and ascertained for the first time that the representations concerning the logging equipment and contract were false, and that his note had been sold by the payee. He interviewed Toft and learned that Toft had indorsed the note "so they could realize on it," and that it had been purchased by Everding & Farrell.

The testimony of Toft is to the effect that Douglas gave him a copy of the prospectus, directed his attention to the printed statements concerning the logging equipment and the logging contract, and at that time

assured the witness that the representations appearing in the prospectus were true; that Douglas represented that the president of the Colombian Timber Company was worth \$100,000; and that the vice-president was worth \$40,000 or more. Toft also says that he was induced by the statements appearing in the prospectus and the representations made by Douglas to indorse the note for the purpose of giving credit to the paper, and he admits that he received 5,000 shares of stock for indorsing the note. Toft claims that he first suspected that the note might be tainted with fraud when Farrell informed him that the paper could be purchased for \$4,000, and it was not until after that conversation that he ascertained the falsity of the statements printed in the prospectus and the falsehoods uttered by Douglas.

1. The defenses interposed by both the maker and the indorser involve two elements: (1) Fraud; and (2) notice to the plaintiff. The maker alleges that the note was induced by fraud, and the indorser avers that the indorsement was brought about by the same means. The perpetration of fraud will not alone defeat the holder of a negotiable instrument, but it must be supplemented by notice to the holder. In the final analysis, the correctness of the ruling on the motion to strike out the testimony relating to the fraud and on the motion for a directed verdict depends upon whether there was any evidence showing notice to the plaintiff when it acquired the note. Everding & Farrell bought the paper before maturity and is a holder in due course, unless the instrument was taken with knowledge of facts amounting to bad faith. There was evidence tending to show that the capital stock of the Colombian Timber Company was worthless, and that the issuance of the note was induced by false representations; and

it now becomes necessary to refer to the statute which defines what constitutes notice, and then to determine whether there is any evidence bringing the plaintiff within the rule.

2. A person is not a holder in due course if he does not take a note in good faith without notice of any infirmity in the instrument or defect in the title of the person negotiating it: Section 5885, L. O. L.

3. A person who takes a note has notice of an infirmity in the instrument or defect in the title to the paper if at the time he took the note he "had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Neither of the answering defendants argue that the plaintiff had actual knowledge of the alleged infirmity in the note itself or in the indorsement, and consequently the plaintiff did not take the paper with notice, unless it had knowledge of such facts that its action in taking the instrument amounted to bad faith.

4. The plaintiff argues that it did not have knowledge of any facts, and that at the most it only had notice of a suspicion or opinion on the part of Toft that possibly something was wrong with the note. The knowledge must be of such facts that the act of taking the instrument amounts to bad faith, and hence the ultimate inquiry is whether on account of the facts known to him the holder was guilty of bad faith. It may be conceded that knowledge of facts which are calculated to arouse the suspicions of an ordinarily prudent man does not as a matter of law constitute bad faith, nor does the owner of commercial paper necessarily forfeit the rights of a holder in due course merely because he neglected to make inquiries or failed to use the caution of that fictitious person known as the

“ordinarily prudent man”: *Matlock v. Scheuerman*, 51 Or. 49, 56 (93 Pac. 823, 17 L. R. A. (N. S.) 747); *Triphonoff v. Sweeney*, 65 Or. 299, 305 (130 Pac. 979); *Bond v. Ellison*, 80 Or. 634 (157 Pac. 1103); *Bowman v. Metzger*, 27 Or. 23 (39 Pac. 3, 44 Pac. 1090); 3 R. C. L. 1072). As said in *Bowman v. Metzger*:

“It is the policy of the law to eliminate from the consideration of the jury the question of common prudence as the measure of good faith, and with it the question of negligence, except in so far as it may be taken as indicative of bad faith.”

While negligence is not synonymous with bad faith, yet a person who takes a note under suspicious circumstances, and, having the means of knowledge, willfully abstains from making inquiries, then his intentional ignorance may result in bad faith, because the final question is one of honesty and good faith: 3 R. C. L. 1075; 8 C. J. 505; *Griffith v. Shipley*, 74 Md. 591 (22 Atl. 1107, 14 L. R. A. 405); *Bowman v. Metzger*, 27 Or. 23 (39 Pac. 3, 44 Pac. 1090); *Benton v. Sikyta*, 84 Neb. 808 (122 N. W. 61, 24 L. R. A. (N. S.) 1057); 7 Cyc. 946. Even though the existence of suspicious circumstances does not necessarily spell bad faith, and negligence is not a synonym for bad faith, and failure to make inquiries does not inevitably create an irresistible force which compels a finding of bad faith, nevertheless since the ultimate inquiry is one of honesty and good faith, it is competent to show the existence of suspicious circumstances, failure to make inquiries and want of prudence, and it then becomes the province of the jury to say whether a person taking with knowledge of those facts is guilty of bad faith: 8 C. J. 501, 502, 503; *Arnd v. Aylesworth*, 145 Iowa, 185 (123 N. W. 1000, 29 L. R. A. (N. S.) 638); *McPherrin v. Tittle*, 36 Okl. 510 (129 Pac. 721, 44 L. R. A. (N. S.) 395);

Matlock v. Scheuerman, 51 Or. 49 (93 Pac. 823, 17 L. R. A. (N. S.) 747); *Harrington v. Butte & Boston Min. Co.*, 33 Mont. 330 (83 Pac. 467, 114 Am. St. Rep. 821); *Canajoharie Nat. Bk. v. Diefendorf*, 123 N. Y. 191 (25 N. E. 402, 10 L. R. A. 676); *Bowman v. Metzger*, 27 Or. 23 (39 Pac. 3, 44 Pac. 1090); 3 R. C. L. 1075.

5. The question of good or bad faith is peculiarly one for the jury and not the court, especially when the burden rests upon the owner of the note to show that he became a holder in due course: *Arnd v. Aylesworth*, 145 Iowa, 185 (123 N. W. 1000, 29 L. R. A. (N. S.) 638); *Union Investment Co. v. Rosenzweig*, 79 Wash. 112 (139 Pac. 874); *Rohweder v. Titus*, 85 Wash. 441 (148 Pac. 583).

6. Section 5892, L. O. L., provides that:

“When it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course.”

And, therefore, when it is shown that a note had its origin in fraud, the burden is then placed upon the owner to prove that he or some person under whom he claims acquired the note as a holder in due course: 3 R. C. L. 1039; *Matlock v. Scheuerman*, 51 Or. 49, 53 (93 Pac. 823, 17 L. R. A. (N. S.) 747); *Sink v. Allen*, 79 Or. 78 (154 Pac. 415); *Griffith v. Shipley*, 74 Md. 591 (22 Atl. 1107, 14 L. R. A. 405); *Arnd v. Aylesworth*, 145 Iowa, 185 (123 N. W. 1000, 29 L. R. A. (N. S.) 638); *Canajoharie Nat. Bk. v. Diefendorf*, 123 N. Y. 191 (25 N. E. 402, 10 L. R. A. 676); *Union Investment Co. v. Rosenzweig*, 79 Wash. 112 (139 Pac. 874). There was ample evidence, if believed, to warrant the jury in finding that the note was induced by

fraudulent representations, and that the capital stock issued to Hoffman was utterly worthless, and consequently by force of the statute Everding & Farrell assumed the burden of showing that it purchased the paper as a holder in due course.

7. The plaintiff admits that it paid \$4,000 for a \$5,000 note. The instrument was purchased after Everding & Farrell had ascertained from a bank that a \$5,000 note would be worth face value if Toft signed it. It is not necessary to decide whether the discount was of itself enough to compel a finding of bad faith, but it is sufficient for the purposes of this controversy to say that evidence of the discount was admissible, especially when viewed in the light of the information received from the bank relative to Toft and the inquiries made or omitted concerning the other indorsers and maker of the note, and the jury was entitled to consider the fact of the discount along with the other evidence already narrated in determining whether the holder was chargeable with bad faith: 8 C. J. 509; *McNamara v. Jose*, 28 Wash. 461 (68 Pac. 903); 3 R. C. L. 1051, 1079; 7 Cyc. 930, 949. See, also, note to *Hogg v. Thurman*, as reported in 17 Ann. Cas. 383.

8. A person is permitted to resort to circumstantial evidence to show that the owner of a negotiable instrument is not a holder in due course, and indeed in many cases it is the only kind of evidence available to a party: 8 C. J. 496; 3 R. C. L. 1041; *Arnd v. Aylesworth*, 145 Iowa 185 (123 N. W. 1000, 29 L. R. A. (N. S.) 638); *Union Inv. Co. v. Rosenzweig*, 79 Wash. 112 (139 Pac. 874); *Bowman v. Metzger*, 27 Or. 23 (39 Pac. 3, 44 Pac. 1090); *Farmers' State Bk. v. West*, 77 Or. 602, 606 (152 Pac. 238).

9. The trial court properly refused to strike out the evidence relating to the fraud charged by the defend-

ants, and it would have been error if the court had directed a verdict, because on the record made by all the parties it was the exclusive province of the jury to determine from all the evidence whether plaintiff took the note in good or bad faith: 8 Cyc. 289; *Owens v. Snell*, 29 Or. 483 (44 Pac. 827); *Sink v. Allen*, 79 Or. 78 (154 Pac. 415.)

10. The plaintiff contends that it was error to instruct the jury that a verdict could be rendered which would discharge Hoffman and at the same time make Toft liable; and Toft argues that the verdict releasing the maker automatically discharges the indorser. At the very beginning of the investigation of this branch of the controversy it must be premised that for the purposes of this appeal the plaintiff has by its pleadings fixed the character of liability which it seeks to impose upon Toft. The complaint charges Toft with being an indorser in due course of business, and therefore he could not at the trial, nor can he on this appeal, be held liable as a maker or as a guarantor; and consequently the rights and obligations of Toft must be measured by the standard fixed for an indorser: *Deering & Co. v. Creighton*, 19 Or. 118, 121 (24 Pac. 198, 20 Am. St. Rep. 800); *Schlittler v. Deering Harvester Co.*, 3 Ga. App. 86 (59 S. E. 342).

11. The person who by the terms of the instrument is absolutely required to pay is primarily liable, and all other parties are secondarily liable: Section 6023, L. O. L. The maker is primarily liable because his promise is absolute, while the indorser is secondarily liable because his promise is contingent and accessory, and when considered as parties to the instrument, the former is prior to the latter. Unless a note has reached the hands of a holder in due course, the

maker can defeat the instrument if it was induced by fraud.

12. The instant case is not governed by Section 5953, subdivision 3, L. O. L., which declares that a person secondarily liable on an instrument is discharged "by the discharge of a prior party." The provision quoted from the statute only applies to a discharge by the act of the creditor, and does not include discharges by operation of law, for example bankruptcy, nor does it embrace a situation where after a trial on the merits the note is in effect destroyed because of a vice which is inherent in the transaction: 7 Cyc. 1048; 8 C. J. 612, 617; 10 Yale Law Journal, 94; 15 Harvard Law Review, 34.

13. If Section 5953, subdivision 3, L. O. L., only applies to discharges by some act of the creditor, then the general principles of suretyship govern. A discharge of the maker by virtue of a judgment predicated upon fraud in the note and bad faith on the part of the holder extinguishes that which has only appeared to be an obligation, but in the end and in its finality is a mere paper which in truth is not a real debt: 8 C. J. 612; *Richards v. Market Exchange Bank Co.*, 81 Ohio St. 348 (90 N. E. 1000, 26 L. R. A. (N. S.) 99). And therefore when after a trial on the merits it is ascertained that because of fraud and notice there is no subsisting debt of the maker, then by the same token there is no debt of the indorser. The judgment in favor of the maker, or principal, satisfies the note, and therefore on general principles of suretyship the indorser, or surety, is not liable because the judgment inures to the benefit of the surety: *Michener v. Springfield Engine & Thresher Co.*, 142 Ind. 130 (40 N. E. 679, 31 L. R. A. 59); *Leslie v. Bonte*, 130 Ill. 498 (22 N. E. 594, 6 L. R. A. 62); *Levi v. McCraney*, 1

Morr. (Iowa) 191; *Soward v. Coppage*, 10 Ky. Law Rep. 436 (9 S. W. 389); *Evants v. Taylor*, 18 N. M. 371 (137 Pac. 583, 50 L. R. A. (N. S.) 1113); *Schlittler v. Deering Harvester Co.*, 3 Ga. App. 86 (59 S. E. 342); 8 Cyc. 66.

Hoffman could be discharged only by finding fraud in the note plus bad faith on the part of Everding & Farrell, and on the case as made by the pleadings of the plaintiff, Toft could only be held liable as an indorser. A verdict releasing the maker necessarily implies fraud in the note followed by notice to the holder and a verdict against the indorser, on the pleadings as they now stand, in the same trial and on the same evidence involves contradictory findings. The verdict is inconsistent with itself, and the instruction which permitted the verdict was erroneous and probably misleading.

The whole verdict is set aside, the entire judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE BURNETT CONCUR.

Argued October 30, reversed November 21, 1916.

LIEBLIN v. BREYMAN LEATHER CO.

(160 Pac. 1167.)

Insane Persons—Service of Summons—Statute—Construction.

1. Under Section 55, subdivision 4, L. O. L., providing that in the case of a person judicially declared to be of unsound mind and for whom a guardian has been appointed summons shall be served by delivering a copy, with a certified copy of the complaint, to such guardian and to the defendant personally, service only upon a defendant,

who had been adjudged insane and for whom a guardian had been appointed, was not sufficient.

[As to due process of law as applied to insane persons, see note in 43 Am. St. Rep. 531.]

Pleading—Action to Vacate Judgment—Demurrer.

2. In a suit to cancel a judgment and restrain execution against land of which plaintiff alleged he was the owner, if defendant desired a more detailed statement as to the derivation of plaintiff's title to the land, he should have proceeded by motion, or in some other manner than by demurrer.

Judgment—Action to Vacate—Grounds—Fraud.

3. Where a trial court had jurisdiction to render a judgment, in order to assail it, although irregular or voidable, it would be necessary to allege that there was fraud or unfairness in the obtainment thereof.

Judgment—Action to Vacate—Nature—"Direct Attack."

4. A suit to cancel a judgment and to enjoin the enforcement thereof by execution against land of which plaintiff claims to be owner is a direct, and not a collateral, attack upon the original judgment.

Execution—Injunction—Judgment Against Another.

5. The owner of real property has the right to restrain the sale thereof under a judgment against a third party, for the payment of which the owner of such realty is not liable.

FROM WASCO: WILLIAM L. BRADSHAW, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is a suit by Frank Lieblin against the Breyman Leather Company, a corporation, and Levi Chrisman, to cancel and restrain the enforcement of a judgment. From a decree sustaining a general demurrer to plaintiff's complaint and dismissing the suit, plaintiff appeals. On December 21, 1911, defendant, the Breyman Leather Company, filed a complaint in the Circuit Court for Wasco County against John W. Dickens, for the recovery of the sum of \$1,117.73. On the same date it filed an affidavit and undertaking for attachment against the property of said John W. Dickens, and a writ of attachment was issued, directing the sheriff to attach all the property of the said John W. Dickens within Wasco County, Oregon, not exempt from execution, or as much as would be sufficient to

satisfy the judgment of the Breyman Leather Company. On that date the sheriff attached the real property claimed to be owned by the plaintiff in this case as the property of said John W. Dickens. On March 26, 1912, said John W. Dickens was, by order of the County Court of Wasco County, adjudged to be an insane person, and on the second day of April, 1912, letters of guardianship were issued to Ida M. Dickens as the guardian of the person and estate of John W. Dickens. On April 17, 1913, in the case of *Breyman Leather Company v. John W. Dickens*, summons was served on the said John W. Dickens personally and in person, but was not served upon his guardian. On March 6, 1914, the Breyman Leather Company recovered judgment against said John W. Dickens for the amount prayed for in its complaint, and for its costs and disbursements, and the attached property was ordered sold to satisfy the same. On August 5, 1914, an attachment execution issued on said judgment, commanding and directing the sheriff of Wasco County to sell the property attached in said action for the satisfaction of said judgment. The sheriff of Wasco County was proceeding to advertise this property for sale at the time this suit was filed, praying for a writ of injunction to enjoin the sheriff from selling said premises at execution sale. Thereafter defendants interposed their demurrer in this suit upon the ground that the complaint does not state facts sufficient to constitute a cause of suit, and the Circuit Court entered an order sustaining said demurrer.

REVERSED.

For appellant the case was submitted on a brief prepared by and over the name of *Mr. Robert R. Butler*.

For respondents there was a brief over the names of *Mr. C. L. Pepper* and *Messrs. Hurlburt & Layton*, with an oral argument by *Mr. Pepper*.

MR. JUSTICE BEAN delivered the opinion of the court.

In addition to the facts stated above, plaintiff alleges that he is the owner of the real estate attached in the action against John W. Dickens, and that on account of a lack of service of the summons upon Ida M. Dickens, the guardian of the defendant in that action, the Circuit Court which rendered the judgment did not acquire jurisdiction over the person of that defendant so as to authorize the rendition of the judgment, and that the same is absolutely void, and should be canceled and the enforcement upon execution enjoined in order to prevent a cloud upon plaintiff's title to the land. The manner of service of summons is regulated by statute, and so long as the legislative enactment does not provide for the taking of property without due process of law, its mandate in this respect must be obeyed. Service of summons upon a person judicially determined to be of unsound mind, for whom a guardian has been appointed, is directed by Section 55, L. O. L., to be made in the following manner:

"The summons shall be served by delivering a copy thereof, together with a copy of the complaint prepared and certified by the plaintiff, his agent or attorney, or by the county clerk, as follows: * * 4. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, to such guardian and to the defendant personally."

1. Before the court is clothed with jurisdiction to render a judgment against John W. Dickens, who, it

is alleged in the complaint, has been judicially declared to be of unsound mind, and for whom Ida M. Dickens has been appointed as guardian, summons must be served upon the guardian as well as upon the ward. In no other manner can there be a compliance with our statute. The laws of other states provide differently.

2. It is contended by counsel for defendant that the judgment cannot be attacked by plaintiff in this suit; that this is a collateral attack. The plaintiff asserts that he is the owner of the land, and brings this suit for the express purpose of restraining the enforcement of the judgment for the reason that his rights will be injuriously affected. If the defendant desires a more detailed statement as to the derivation of plaintiff's title to the land, he should have proceeded by motion or in some other manner than by demurrer.

3, 4. If the trial court had obtained jurisdiction to render the judgment in question, then in order to assail it, although the same be irregular or voidable, it would be necessary to allege that there was fraud or unfairness in the obtainment thereof. This suit is for the purpose of canceling the questioned judgment, and for an injunction to enjoin the enforcement thereof upon execution. It is a direct attack upon the original judgment: 3 Words and Phrases, 2070; *Morrill v. Morrill*, 20 Or. 96 (25 Pac. 362, 23 Am. St. Rep. 95, and note, 11 L. R. A. 155, and note); *Walker v. Goldsmith*, 14 Or. 125 (12 Pac. 537); *Smith v. Morrill*, 12 Colo. App. 233 (55 Pac. 824).

5. The owner of real property has a right to restrain the sale thereof under a judgment against a third party for the payment of which the owner of such realty is not liable: *Wilhelm v. Woodcock*, 11 Or. 518 (5 Pac. 202).

It is suggested by defendant's counsel that the service of the summons in the original action can be completed. It may be that upon the development of the equities of the case other questions may arise, but until they do, it would be premature to discuss them.

The lower court erred in sustaining the demurrer to the complaint; and the decree is reversed and the cause is remanded, with directions to overrule the demurrer, and for such other proceedings as may be deemed proper, not inconsistent herewith.

REVERSED.

Motion to dismiss appeal allowed October 10, rehearing denied November 27, 1916.

HUTCHISON v. CRANDALL.

(160 Pac. 124.)

Appeal and Error—Time in Which to Serve Notice of Appeal—Statute.

1. Under Section 550, L. O. L., as amended by Laws of 1913, page 617, Section 1, requiring service of a notice of appeal within 60 days from the date of the judgment, and Section 541, declaring that service by mail is deemed complete on the first day after the date of deposit of the notice in the postoffice that the mail leaves such postoffice, a notice of appeal from a judgment rendered May 23, 1916, mailed on July 22d, excluding the day that judgment was rendered and including the last day, was not mailed until the sixty-first day, and was too late, and the appeal will be dismissed.

From Columbia: JAMES A. EAKIN, Judge.

This is an action by M. T. Hutchison against Mrs. F. D. Crandall in which a judgment was rendered in favor of plaintiff, and defendant appeals.

APPEAL DISMISSED. REHEARING DENIED.

Mr. M. F. Müller and Mr. W. A. Harris, for the motion.

Mr. Sam M. Johnson, contra.

In Banc. MR. JUSTICE McBRIDE delivered the opinion of the court.

This is a motion to dismiss defendant's appeal. The judgment was rendered May 23, 1916, at St. Helens, Oregon. The proof of service shows that notice of appeal was mailed in Portland on July 22d, directed to defendant's attorneys at St. Helens. The statute requires service of notice of appeal within 60 days from the date of the judgment: Section 550, L. O. L., as amended by Laws 1913, p. 617. By Section 541, L. O. L., service by mail is deemed complete on the first day after the date of deposit of the notice in the postoffice that the mail leaves such postoffice for the place to which the notice is sent. Excluding the day that the judgment was rendered and including the last, we find that there remained 8 days in May, 30 days in June, and 22 days in July within which to complete the service. The service by reason of the provisions of Section 541, L. O. L., was not made upon the plaintiff's attorneys until July 23d, which was the sixty-first day.

The notice was therefore served one day too late, and the appeal is dismissed.

DISMISSED. REHEARING DENIED.

Argued July 20, affirmed October 10, rehearing denied November 27, 1916.

MYERS v. STROWBRIDGE ESTATE CO.*

(160 Pac. 135.)

Mechanics' Liens—Right to Lien—Contract With Lessee—"Agent"—Statute.

1. Under Section 7416, L. O. L., conditioning the right to a mechanic's lien upon the labor and material being furnished at the instance of the owner or his agent, a lessee under a lease providing, as a part consideration thereof, that he should make permanent improvements which should revert to and become the property of the lessor, and who causes such improvements to be made, becomes the "agent" of the lessor.

Mechanics' Liens—Waiver—Knowledge—Provision in Original Contract.

2. Where the owner and lessor made his lessee an agent to make improvements on the leased premises, a stipulation in the agent's contract that the owner and lessor should not be responsible for any bills contracted in the improvement was not binding upon a subcontractor, unless he assented or agreed to be bound thereby; and the subcontractor's knowledge alone of the original contractor's waiver of his lien did not constitute a waiver of the subcontractor's lien.

Mechanics' Liens—Persons Liable—Owner—Notice Denying Liability.

3. Under Section 7419, L. O. L., providing that every building constructed on land with the knowledge of the owner shall be held to have been constructed at his instance and shall be subject to liens, unless within three days after knowledge of such construction he post a notice that he will not be responsible therefor, premises leased for a term and under which the lessee became the owner's agent and contractor for its improvement were subject to the liens of subcontractors, notwithstanding the posting of such notice.

Mechanics' Liens—Improvements of Leased Premises—Owner's Notice of Nonliability—Effect.

4. Under such provision and Section 7416, L. O. L., giving a lien to every person performing labor upon or furnishing material used in the construction of any building at the instance of the owner or his agent, and making every contractor an agent for the owner, and Section 7417, imposing such lien upon the land if it belongs to the person who caused the improvements, the posting of notices by the owner and lessor that it would not be responsible for the payment for labor or materials furnished for improvements made by its lessee, as agent or contractor, would not affect the matter of the waiver of

*For authorities passing on the question of construction of stipulation of contractor or subordinate, with reference to his own rights, see note in 50 L. R. A. (N. S.) 153.
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the subcontractors' liens, or prevent a lien upon the improved building, or even inform them that the lessee, as contractor, had stipulated that no lien should attach to the premises.

Mechanics' Liens—Plans and Specifications—Reference—Effect.

5. Where a lessee, as the owner's agent and contractor, employed an architect to prepare plans and specifications for the improvement of the leased premises, and in the heading on the first page the building was described as owned by the lessor, and on the first page of the specifications there was a provision inserted at the lessor's request that he would not be responsible for any bills contracted in the improvement therein specified, and where the two pages of the specifications relating to subcontractor's work were detached from the remainder and given to and signed by them without directing their attention to the provision that the owner and lessor should not be responsible, etc., the reference could serve only the purpose of furnishing the plans and specifications for the work, under the rule that where reference is made in one document to another unattached document for a specific purpose only, such other document becomes a part of the former for such purpose only.

Mechanics' Liens—Original Contractors—Waiver—Subcontractors—Effect.

6. In view of the statute giving a direct lien to persons furnishing labor and material in the alteration of a building, upon the estate of the person causing the alteration to be made, as a privilege or right for their protection, based on the theory of having added to the value of the estate with the consent of the owner, the fact that the original contractor has agreed with the owner to protect him against liens is not an agreement on the part of subcontractors that they will look exclusively to the original contractor and not to the property for their compensation, as in such case there is no meeting of the minds of the contracting parties to that effect.

Mechanics' Liens—Subcontractors—Waiver.

7. The agreement of subcontractors to accept a part of their compensation in the preferred stock of the lessee, the owner's agent and contractor, did not amount to a waiver of their right to a lien to that extent, where the stock was never delivered or tendered as security or payment.

[As to waiver of mechanic's lien by taking notes or other securities, see note in 41 Am. St. Rep. 761.]

From Multnomah: HENRY E. MCGINN, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

Plaintiff, J. H. Myers, commenced this suit to foreclose a mechanic's lien. Defendant, Forth Plumbing & Heating Company, a partnership, designated herein as the Forth Company, filed a cross-complaint to foreclose its liens. From a decree in favor of the lien

claimants awarding plaintiff \$1,819.99, with interest, and \$150 attorney's fee, and the Forth Company \$5,425.57, with interest, \$350 attorney's fee, and costs and disbursements, defendant, the Joseph A. Strowbridge Estate Company, a corporation, hereinafter named as the Strowbridge Estate, appeals.

On January 31, 1912, the Strowbridge Estate was the owner of lots 4, 5 and 6 in block 14 of the City of Portland, Multnomah County, Oregon, and the buildings thereon. On that date it entered into a lease and contract with J. Nudelman, demising the premises for the term of ten years at a rental of from \$1,500 to \$2,150 a month for the first five years, and from \$2,150 to \$2,500, as might be arranged, for the last five years. On February 22, 1912, this lease with the consent of the Strowbridge Estate, was assigned to the Yamhill Sanitary Public Market Company, which for brevity's sake we will hereafter call the Market Company. J. Nudelman was the president and managed the principal affairs of this company. The lease contained, among others, the following stipulations:

"That said lessee will and shall make all the necessary changes, repairs, alterations, additions and improvements to, and upon all the said above-described premises, as so desired by said lessee, he doing all the work, furnishing all of the labor, materials of all kinds, placing and furnishing the heating plant, elevator service, electric wiring, plumbing of all kinds and each and everything that he may desire to change said premises to conform with their plans, including the tearing down and removing the small brick building in the rear of number 227 Yamhill Street, and making such improvements as they may desire upon said part of said lot six (6) aforesaid, all of said improvements to be free from all cost or expense to the said lessor, excepting that the said lessor is to keep the roof and sidewalks in good repair.

"All of the work, alterations, changes, additions or improvements to be done upon said premises or any part thereof, are to be under the supervision of a competent architect to be employed by, and his services therefor paid by the said lessee, and the said work and improvements so done are to be performed in a substantial manner, subject, however, to the approval of said lessor, and the plans therefor are to be submitted by the said lessee to the said lessor before any work, changes or improvements are made to said premises. * *

"And the said lessor is to be held absolutely harmless from any claim of damages arising out of contracts, liens, material or labor furnished or otherwise, from the said improvements that are to be, or shall be, made thereon and thereto, and at the end of this lease or upon sooner termination thereof the said improvements, changes or additions made to or upon the said premises or any part thereof shall be turned over to the said lessor, its successors and assigns, by the said lessee, free of all cost, or from any claim or claims to the same or any part thereof. * *

"The said lessee is to forthwith deposit with the said lessor a certified check payable in favor of the said lessor in the sum of six thousand (\$6,000) dollars, said money to be held by the said lessor without interest except as aforesaid as security and for the faithful performance by the said lessee in carrying out all of the initial improvements agreed upon herein, * * and to indemnify the said lessor against all liens for work, labor or materials furnished, or both, that the said lessee may allow or cause to be placed on or against the premises or any part thereof, or on any improvement that the said lessee may make thereon. * *

"It is further agreed * * that the said lessee is not to expend a sum of money upon said premises less than twelve thousand five hundred (\$12,500) dollars for said improvements upon the same, and such improvements and changes are to commence, and the same to be done as soon thereafter as the turning over of said premises by the said lessor to the said lessee, as shall be reasonable. * * "

Certain changes in the original contract were made by supplemental agreements between the Strowbridge Estate and the Market Company, one of April 10, 1912, wherein it appears as follows:

“It is further agreed and understood by the said parties herein, that the lessor being the owner of the premises herein, may employ a competent man to supervise all the work, alterations and improvements to be done and performed upon all of said leased premises, and to pay for said services. Said supervisor to act for all of the parties herein and to see that the work is properly done and performed in a good first-class manner, and all of said parties to abide by the judgment of said supervisor therein.”

In another dated August 12th of the same year it was agreed that preferred stock in the Market Company should be deposited in lieu of the \$6,000 deposited as a guaranty by that company. Another stipulation was made on November 25, 1912, in which, among various other things, it was provided that the Strowbridge Estate should pay certain expenses to be incurred by placing iron columns and I beams in the building on Yamhill Street. Still another contract as to a reduction of the rental was made December 14, 1912. The Market Company thereupon employed H. M. Fancher, an architect, to prepare plans and specifications for the work. In the heading on the first page the building is described as owned by the Strowbridge Estate Company. On the first page of these specifications at the request of the owner there was inserted the following clause:

“The owners of the building will not be responsible for any bills contracted in the alteration of the building nor for any of the works herein specified.”

Negotiations were had with certain contractors not satisfactory to Strowbridge Estate, and afterward a

contract for the work was entered into with the Wineland Company. This company made important changes in the plans and specifications prepared by Mr. Fancher. After these had been approved by both the Market Company and the Strowbridge Estate, the contract with the Wineland Company was canceled upon the payment of \$300 to the latter, the work was divided up and various parts awarded to different contractors.

Under an agreement with the Market Company dated July 13, 1912, plaintiff Myers installed a complete heating system. The two pages of the specifications relating thereto were detached from the remainder and each was identified by the signatures of the contracting parties. While Myers was engaged in installing the heating system, owing to certain changes made by the Market Company and the Strowbridge Estate in the original contract, it became necessary that plaintiff's contract and work be modified accordingly. All changes that were made became a part of the original contract and were approved by the Strowbridge Estate and the Market Company. By reason of the changes made in the first plans and specifications an expenditure of many thousands of dollars was necessitated, more than that called for by the original plans. On August 6, 1912, the Forth Company entered into a contract with the Market Company to furnish materials and do the plumbing work. The Forth Company claimed they saw only that part of the specifications which pertained to such work when they were awarded the contract and were given only the few sheets which contained the directions relating thereto and the description of the plumbing material to be used. In the plumbing contract there were, among other things, the following two clauses:

"Article I. The contractor shall and will provide all the materials and perform all the work for the installation in the buildings on lots 4, 5 and 6, block 14, City of Portland of the following: [here follows an enumeration of a number of plumbing supplies] as shown on the drawings and described in the specifications prepared by H. M. Fancher, Architect, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract. * *

"Article IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials shall be five thousand three hundred (\$5,300.00), subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owner to the contractor in current funds and only upon certificates of the architect, as follows: Thirty per cent thereof when roughing in thereof is completed and 30 per cent thereof when work is finished and 40 per cent thereof in preferred stock of the owner bearing 7 per cent interest and to be redeemed by owner in thirty monthly installments beginning thirty days after issue. If the building is finished in two sections the cash payment shall be prorated according to the proportion of the work done, and the stock shall be issued upon the completion of the work."

In the Myers heating contract it was provided that of the \$3,900.00 to be paid him 30 per cent was to be paid in preferred stock of the Market Company, "bearing 7 per cent interest and redeemable in thirty monthly installments, said stock to be issued upon completion of this contract." None of the preferred stock in the Market Company was ever delivered to plaintiff Myers or to the Forth Company. Neither was that company in a position to deliver the same. The term of the lease commenced June 15, 1912. About June 3d, numerous notices of nonliability were posted by the owner in conspicuous places on the building and

several of them remained so posted during the entire construction, a copy of which notice is as follows:

"NOTICE.

"Notice is hereby given that the Joseph A. Strowbridge Estate Company, a corporation, the owners of these premises, the same being lots numbered four, five and six in block fourteen, City of Portland, Oregon, with the brick buildings thereon, will not be responsible or pay for any materials or labor used, furnished, delivered or performed by any person or persons, firm or corporation whatsoever, on said premises, or any part thereof, or for any construction, alteration or repairs thereto or for any liens, unpaid bills, accounts, claims, labor or material contracted for or used in the alteration, repairing or the remodification of said premises aforesaid, or any part thereof, at any time or times whatsoever.

"In witness whereof, the said Joseph A. Strowbridge Estate Company, a corporation, pursuant to a resolution of its board of directors, heretofore adopted, have caused this notice to be signed, given and posted by its president and secretary and the corporate seal to be affixed hereto.

"THE JOSEPH A. STROWBRIDGE ESTATE Co.,

"By J. A. STROWBRIDGE,

"President.

"[Seal] THE JOSEPH A. STROWBRIDGE ESTATE Co.,

"By A. B. STROWBRIDGE,

"Secretary.

"Dated June 3, 1912."

The Market Company became financially embarrassed, and was unable to pay for the work done or the materials furnished in the remodeling of the building. Plaintiff Myers states that when he was awarded the contract he saw only that part of the specifications pertaining to the heating system and was given just the two sheets containing the specifications therefor. The first boiler for heating that Myers installed did not comply with the contract and was not satisfactory,

and he installed another. Myers finished his work March 15, 1913, and filed a notice of lien on April 3d of that year. The Forth Company finished their work on February 19, 1913, and filed a notice of their lien on March 15th of that year. The Strowbridge Estate paid on account of the work and materials in this building a fraction over \$29,000. This amount included three loans made to the Market Company aggregating \$16,000. Defendant George E. Reed superintended the work for the Market Company, and the Strowbridge Estate employed A. Walkly to look after its interest in the reconstruction of the building, pursuant to the stipulation in the lease. He was personally present nearly all the time during the rebuilding of the edifice, and the principal, if not all, the changes made in the plans which occasioned additional expense and also deductions from the original contract price were agreed to by contracts made at the time or settled after that portion of the work was done.

AFFIRMED. REHEARING DENIED.

For defendant and appellant there was a brief over the names of *Mr. William W. Cotton*, *Mr. H. W. Strong*, and *Mr. J. A. Strowbridge*, with oral arguments by *Mr. Cotton* and *Mr. Strong*.

For plaintiff and respondent there was a brief and an oral argument by *Mr. W. J. Makelim*.

For defendants and respondents there was a brief over the names of *Messrs. Malarkey, Seabrook & Dibble* and *Messrs. Giltner & Sewall*, with an oral argument by *Mr. Ephraim B. Seabrook*.

MR. JUSTICE BEAN delivered the opinion of the court.

The Strowbridge Estate in its answer to the lien claimants maintains that its property is not subject to

liens for the debts of the Market Company, the lessee, for the following reasons:

“(1) The lien claimants knew of the provisions of the lease exempting the property from liens. (2) Owner's property is exempted from liens by the notices of nonliability and the knowledge conveyed thereby to lien claimants prior to the making of the improvements. (3) Lien claimants waived their right to liens by express contract to that effect. (4) Notices of liens were not filed within 30 days after the completion of the work.”

The reasonable value of the work and the right to liens for part of the price agreed to be taken in stock is also in issue. It is stated in the brief of the learned counsel for the defendant Strowbridge Estate as follows:

“The legal effect of the lease in this case is to make the lessee a contractor within the meaning of the mechanic's lien law for the alterations and repairs contemplated by the lease: *Oregon Lumber & Fuel Co. v. Nolan*, 75 Or. 69 (143 Pac. 935). Thus the lessee will be considered as a contractor with the owner and the lien claimants as subcontractors in considering the rights of the parties herein.”

This statement practically disposes of the question raised by the notice of nonliability posted on the building.

1, 2. It is contended by counsel for the Strowbridge Estate that subcontractors waived their right to liens for the reason that they had knowledge of the stipulation made by the Market Company in the principal contract prior to the time of furnishing materials or performing labor upon the premises, and they cite *Hume v. Seattle Dock Co.*, 68 Or. 477 (137 Pac. 752, 753, 50 L. R. A. (N. S.) 153); *Zanella v. Heating Co.*, 70 Or. 69 (139 Pac. 572, 575); *Hughes v. Lansing*, 34

Or. 118 (55 Pac. 95, 96, 75 Am. St. Rep. 574). In *Hume v. Seattle Dock Co.*, 68 Or. 477 (137 Pac. 752, 753, 50 L. R. A. (N. S.) 153), it was claimed that when the owner and builder stipulate that no mechanic's lien shall be filed, such a stipulation binds the subcontractors. In commenting upon the rule in a few states where the subcontractor is bound by a nonlien stipulation in the original contract, Mr. Justice ELKIN said:

"By this rule the laborer is not consulted, and he must accept the work under the conditions of the original contract, in the making of which he had no voice. It was to protect the workman against such conditions that our lien law was enacted. A lien is not given through the contractor by subrogation, but is a direct and independent lien to each claimant against the property."

The opinion is not authority for the claim made. It does not go to that extent. In *Zanella v. Heating Co.*, 70 Or., at page 76 (139 Pac., at page 575), Mr. Justice RAMSEY said:

"The right to a lien was created by statute, and it cannot be annulled by the owner's giving notice that he will not 'recognize' such right, or by saying, in the building contract, that he will not be responsible for the claims of persons furnishing material or labor for the building. A contractor, a subcontractor, or a person furnishing labor or material for a building can waive his right to a lien by agreeing that he will not claim a lien, or by assenting to a provision in a contract stating that no liens shall be claimed or filed upon the building. But a person furnishing labor or material that goes into a building cannot be deprived of his right to file a lien, excepting by his contract, or by acts on his part constituting an estoppel."

By Section 7416, L. O. L., the right to a lien upon a building is conditioned upon the labor or material for which the lien is claimed being furnished "at the in-

stance of the owner of the building * * or his agent." Where it is provided in a lease as a part of the consideration thereof that the lessee shall make permanent improvements which shall revert to and become the property of the lessor at the termination of the lease, the lessor thereby causes the improvement to be made, and the lessee becomes the agent of the lessor in the making of such improvements. This section declares who shall be deemed such agent of the owner. The waiver by virtue of a stipulation in the original contract that no lien will be permitted implies that there was an assent to the stipulation, or an agreement on the part of the subcontractor not to claim a lien. The Strowbridge Estate, the lessor, required a deposit of \$6,000 to be made by the Market Company to indemnify the lessor against any lien the lessee might cause or allow to be placed on the premises. This provision in the original contract between the owner, Strowbridge Estate, and the Market Company, the contractor, seems to have contemplated that work would be done upon the building and materials furnished for which the structure would be subject to a lien. In such cases a subcontractor does not waive his lien by reason of an agreement between the principal contractor and the owner to the effect that liens should not be filed unless the subcontractor assents or agrees to be bound by such stipulation. Knowledge alone by a subcontractor that the original contractor has waived his lien does not constitute a waiver by a subcontractor of his personal right to a lien for his work and materials in the absence of some agreement on his part that he will also be bound by the original contractor's waiver: *St. Johns Lbr. Co. v. Pritz*, 75 Or. 286 (146 Pac. 483); *Schade v. Muller*, 75 Or. 225 (146 Pac. 144); *Norton v. Clark*, 85 Me. 357 (27 Atl.

252); *Miles v. Coutts*, 20 Mont. 47 (49 Pac. 393); *Hume v. Seattle Dock Co.*, 68 Or. 477 (137 Pac. 752, 753, 50 L. R. A. (N. S.) 153); *Zanella v. Heating Co.*, 70 Or. 69 (139 Pac. 572, 575).

3. The Nolan Case, which was decided after the present suit was tried in the lower court, eliminates the question relating to the posting of notices of non-liability by the owner of the land under Section 7419, L. O. L., and disposes of the main part of this controversy.

4. It is contended, however, that the notice was information to the subcontractors that the original contractor had made a nonlien stipulation with the owner. The provisions for this notice are intended to relieve the owner of the land upon which an edifice is constructed, when he has not contracted for the improvement, from the liability of having a lien attached to his land: *Oregon Lumber & Fuel Co. v. Nolan*, 75 Or. 69, (143 Pac. 935, at 937). The posting of such notices would not prevent the lien upon the building itself as provided for in Section 7416, L. O. L., and a laborer or materialman might still rely upon the structure as security for his pay, and by taking proper measures have the same sold and removed according to the terms of Section 7417, L. O. L., which is as follows:

“The land upon which any building or other improvement as aforesaid shall be constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof (to be determined by the judgment of the Circuit Court at the time of the foreclosure of such lien), shall also be subject to the liens created by this act, if, at the time the work was commenced or the materials for the same had been commenced to be furnished, the said land belonged to the person who caused said building or other improvement to be constructed, altered or repaired; but if such person owned less than

a fee-simple estate in such land, then only his interest therein shall be subject to such lien; and in case such interest shall be a leasehold interest, and the holder thereof shall have forfeited his rights thereto, the purchaser of such building or improvements and leasehold term, or so much thereof as remains unexpired at any sale under the provisions of this act, shall be held to be the assignee of such leasehold term, and as such shall be entitled to pay the lessor all arrears of rent or other money and costs due under said lease, unless the lessor shall have regained possession of the said land and property, or obtained judgment for the possession thereof, prior to the commencement of the construction, alteration or repair of the building or other improvement thereon; in which event, said purchaser shall have the right only to remove the building or other improvement, within thirty days after he shall have purchased the same; and the owner of the land shall receive the rent due him, payable out of the proceeds of the sale, according to the terms of the lease, down to the time of such removal."

Therefore, the posting of the notices by the Strowbridge Estate would not affect the matter of a waiver of the lien. The notice in question would not even inform the claimants that the Market Company, the contractor, had stipulated that no lien should attach to the premises; but, on the other hand, if considered with a knowledge of the provisions of the statute would tend to indicate that the owner of the estate had made no contract for the improvement.

5. As stated above, when the respective contracts were executed by Myers and the Forth Company two or three pages of the specifications, one set relating to the heating system and the other to the plumbing work, were detached and given to them, and those particular pages were signed by the respective subcontractors. Their attention was not particularly directed to the clause inserted on the first page of what was desig-

nated in the heading as "Specifications" and "General Remarks," to the effect that the owner would not be responsible for the work. It may have been noticed in a casual or general way. The rule seems to be well established that where reference is made in one document to another unattached document for a specific purpose only, such other document becomes a part of the former for such special purpose only. The reference to the Fancher specifications in the Myers' and Forth Company's contracts can serve only for the purpose of furnishing the plans and specifications for the plumbing and the installation of the heating system: *Moreing v. Weber*, 3 Cal. App. 14 (84 Pac. 220); *Stewart v. American Bridge Co.*, 108 Md. 200 (69 Atl. 708); *Young v. Borzone*, 26 Wash. 4 (66 Pac. 135); *Meredith v. Bitter Root Co.*, 49 Mont. 204 (141 Pac. 643, 648). The covenant in the lease from the Strowbridge Estate to the Market Company to the effect that no lien would be suffered to be placed upon the premises was not known to the claimants until after a large part of their work was performed and materials furnished. It does not appear that either of these claimants assented to the nonlien stipulation. In *Norton v. Clark*, 85 Me. 357, 360 (27 Atl. 252), Mr. Justice EMBURY, in commenting upon a similar stipulation between an owner and a building contractor, said:

"This particular stipulation, like all other stipulations, binds only those who made it or assented to it."

6. By virtue of our statute a direct lien is given to every person who shall furnish material and perform labor in the construction, alteration or repair of a building. That lien is upon the estate of the person causing the construction, alteration or repair to be made. Such lien is a privilege or right given to such

persons for their protection, and is based upon the theory that they have added to the value of the estate with the consent of the owner, and therefore such estate is liable therefor. The fact that the original contractor has agreed with the owner to protect him against liens cannot be said to be an agreement, on the part of the subcontractors, materialmen and laborers that they will look exclusively to the original contractor and not to the property for their compensation. The builder's main contract is to the same effect as the nonlien stipulation, and, if he fully complies therewith, there would be ordinarily no occasion for the filing of a lien by subcontractors, materialmen or laborers. His nonlien stipulation, so far as to others than himself are concerned, is a mere duplicate of his principal agreement, and subcontractors, materialmen and laborers cannot be bound by such a stipulation, unless they agree to the same. In such a case, as in any contract, there must be a meeting of the minds of the contracting parties to that effect.

7. The agreement of the subcontractors to accept a portion of their compensation in preferred stock of the Market Company to be redeemed within a certain time did not amount to a waiver of their right to a lien to that extent, as the stock was never delivered or tendered as security or payment to them: *McMurray v. Brown*, 91 U. S. 257 (23 L. Ed. 321); *Springer Land Assn. v. Ford*, 168 U. S. 513 (42 L. Ed. 562, 18 Sup. Ct. Rep. 170). The claimants did not waive their right to a lien on the premises.

From a reading of the 800 pages of typewritten testimony and an examination of the several contracts and exhibits in the case we find that each of the lien claimants filed a notice of lien within the statutory time, and that the work was performed and the ma-

terials furnished in accordance with the contract and the changes made therein by agreement. During all the time of the performance of the work and the furnishing of the materials involved herein the reconstruction of the building was superintended on the part of the Market Company by George E. Reed, a competent person, and in behalf of the Strowbridge Estate by Mr. A. Walkly, an experienced builder, who was employed by it for that purpose pursuant to the terms of the original contract between it and the Market Company. Many of the questions as to the compensation arising on account of the modifications in the plans and specifications and the agreed departures therefrom were settled and adjusted by the parties through the instrumentality of the superintendents, and such supervision indicates that the materials furnished were in accordance with the agreement therefor. It is plain that the remodeling of the building was proposed to be made at too small a cost, and that the best materials were not at first specified. This no doubt necessitated many changes, and it may be that the modifications resulted in some incongruity or kind of patchwork, but we find from the evidence that the work was done by the lien claimants according to their contracts, and that the amounts allowed are reasonable.

The decree of the lower court will therefore be affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE HARRIS and MR. JUSTICE BENSON concur.

Argued September 5, affirmed October 10, rehearing denied November 27, 1916.

STATE ~~EX~~ REL. v. EVANS.

(160 Pac. 140.)

Schools and School Districts—Annexation of District—Void Order Calling Election.

1. An order calling an election on the question of whether a school district be annexed to a high school district is void for legal fraud and lack of jurisdiction if the district boundary board had no information concerning the number of legal voters in the school district except the statements found in the petition and remonstrance, and later developments reveal that the petition did not contain the names of the necessary one third of the legal voters.

Quo Warranto—Abolition of Remedy—Substitution.

2. By Section 363, L. O. L., the writ of *quo warranto* and information in the nature of *quo warranto* have been abolished, but only the forms have been done away with, as the remedies obtainable thereunder are still available by an action at law, prosecuted in the name of the state under the authority of Section 366.

[As to contrast between election contest and *quo warranto* proceedings, see note in Ann. Cas. 1913C, 161.]

Schools and School Districts—Consolidation—Legality—Burden of Proof.

3. In a statutory action in the nature of *quo warranto* requiring a district boundary board to show by what authority they acted in consolidating a school district with a union high school district, plaintiffs alleging the annexation was illegal because the requisite number of voters did not sign the petition for an election on the question, defendants must allege all the facts necessary to show that the school district was legally annexed; the burden of proof resting upon them to show that the two districts were legally consolidated.

Schools and School Districts—Consolidation—Petition—Election—Statute.

4. Under Section 4194, L. O. L., relative to elections to unite school districts for high school purposes, an election on the question of whether a school district be annexed to a union high school district was void, and the attempted annexation came to naught, unless the petition for the election from the school district was signed by not less than one third of the legal voters, the petition being jurisdictional and no petition at all unless in conformity with the statute.

Evidence—Presumption—Doing of Prior Act.

5. When the legality of a subsequent act depends upon the doing of a prior act, proof of the performance of the subsequent act may carry with it, until the contrary is shown, the presumption that the prior act was correctly done, the rule of presumption being not necessarily conclusive.

Schools and School Districts—Consolidation—Attack by Quo Warranto—Evidence Dehors the Record.

6. In *quo warranto* against a district boundary board demanding that it show by what authority it ordered the consolidation of a school and a high school district, complainants claiming that the annexation of the school district was not legal because the petition for the election on the question was not signed by the requisite number of voters, complainants could offer evidence *dehors* the record that the petition was not signed by the requisite number, the petition and order for election not of themselves proving the sufficiency of the petition.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

This is an action by the state on the relation of School District No. 25, and others, against J. Ward Evans and others. The following are the facts:

Petitions were circulated in seven school districts of the third class and numbered 35, 36, 39, 41, 43, 48 and 50, asking the district boundary board to call an election to unite them for high school purposes. The petition for district No. 36 and one circulated in district No. 50 were not signed by one third of the legal voters, and for that reason they were not sufficient to authorize the holding of an election in those two districts. Having received all the petitions from the seven school districts, the district boundary board ordered the holding of an election and caused a notice to be sent to the chairman of the board of school directors for each district, except districts 36 and 50, directing that the election be held. Notices that the election would be held for the purpose of uniting districts 35, 39, 41, 43 and 48 were duly posted in each of those districts and at the election, which was held in the five districts, a majority voted for a union high school district. Having canvassed the votes the district boundary board declared on September 1, 1914, that districts 35, 39, 41, 43 and 48 were duly united for

high school purposes under the name of Union High School District No. 1. The chairmen of the five school district boards, who by force of law became the directors of the union high school district, organized as directors of the union high school by electing J. Ward Evans as chairman and F. N. Lasley as clerk. A union high school was opened on September 28, 1914, and afterward a union high school building was constructed at an expense of about \$9,000.

During September, 1914, but after the middle of the month, a petition was circulated in school district No. 25, a district of the third class, asking the district boundary board to direct that an election be held on November 7, 1914, for the purpose of uniting that school district with union high school district No. 1. The names of 15 persons were signed to the petition which was circulated in school district No. 25. A similar petition for the annexation of school district No. 25 was also circulated in the territory embraced within the boundaries of the union high school district. Acting upon these two petitions, the district boundary board on October 26, 1914, ordered that an election be held on November 7, 1914, to decide whether school district No. 25 should be annexed to union high school district No. 1. Before making the order of October 26, 1914, the district boundary board received a writing which will be called a remonstrance. After reciting that they had signed the petition for the annexation of school district No. 25 on account of a misunderstanding of the facts and praying "that no further action be taken upon said petition," the remonstrance is signed by 8 persons who had signed the petition which had been circulated in school district No. 25 for the annexation of the territory to the union high school district. Appended to the remonstrance was a writing

which, after confirming the recitals in the remonstrance and requesting "that no proceedings be taken compelling the joinder of said school district No. 25 with said union high school district No. 1," was signed by 37 persons who represented themselves to be "legal voters of school district No. 25." The remonstrance was overruled by the district boundary board and no attempt was made to review its decision. The election was held on November 7, 1914, pursuant to notice and the order of the district boundary board. In the union high school district, 29 voted for and 2 voted against annexation, while in school district No. 25, 4 votes were cast for and 16 given against consolidation. After canvassing the votes the district boundary board declared that school district No. 25 and union high school district No. 1 "were legally united for high school purposes." The chairman of the school board of school district No. 25 refused to act as a director of the union high school district. Claiming to be the officers of union high school district No. 1 and asserting that school district No. 25 is included within union high school district No. 1, all the defendants except E. D. Chamberlain levied a tax on November 14, 1914, on all the taxable property within the union high school district including district No. 25. Afterward, on February 6, 1915, this action, which is the statutory substitute for the writ of *quo warranto* as well as for the proceeding by information in the nature of *quo warranto*, was commenced by the relators who as legal voters and taxpayers of school district No. 25 demand that the defendants be required to show by what authority they have acted, and that the pretended consolidation of school district No. 25 with union high school district No. 1 be dissolved. The trial court ruled that no question could be raised against the valid-

ity of the election which was held on August 25th when the five school districts voted to consolidate for union high school purposes, for the reason that the relators did not reside in or pay taxes on any property within any of these five districts. The court found from the evidence that there were 41 legal voters qualified to vote at school elections in school district No. 25, and that there were "11 other legal voters of the State of Oregon who had not the property qualifications necessary to entitle them to vote at school elections"; that the name of H. Henriksen and E. Bourgeois should be stricken from the petition which was circulated in school district No. 25, because the former was not a legal voter, and the latter neither signed nor authorized her name to be signed to the petition; that the petition circulated in school district No. 25 was not signed by one third of the legal voters and consequently was not sufficient to confer jurisdiction, and that therefore school district No. 25 is not a part of the union high school district. A judgment was rendered for the relators in conformity with the findings made by the court, and the defendants appealed.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief over the name of *Messrs. Malarkey, Seabrook & Dibble*, with an oral argument by *Mr. Ephraim B. Seabrook*.

For respondents there was a brief and an oral argument by *Mr. John M. Haddock*.

MR. JUSTICE HARRIS delivered the opinion of the court.

The relators allege that union high school district No. 1 does not legally exist, for the reason that the

petitions asked for the consolidation of seven school districts while the election was called to unite five districts. The defendants say that the relators cannot question the legality of the original organization of the high school district, because all of the relators reside in school district No. 25 and none of them pay taxes on property in any of the five school districts which were united by the original organization of the high school district. An examination of this phase of the controversy between the parties will not be necessary, because of the conclusions reached upon another branch of the case, and we shall therefore assume, without deciding, that as a result of the election which was held on August 25, 1914, the five school districts, numbered 35, 39, 41, 43 and 48, were legally consolidated as union high school district No. 1.

The relators have challenged the defendants to show any right or authority for treating school district No. 25 as a part of union high school district No. 1; the defendants justify their acts by alleging that school district No. 25 was legally annexed to the high school district by an election which was ordered and held after the district boundary board had received a petition for annexation from the high school district and a similar petition from school district No. 25 signed by more than one third of the "30 legal voters qualified to vote at school elections in said district, and more than one third of said legal qualified voters of said school district No. 25, to wit, 14 thereof." The relators reply by saying that the petition from school district No. 25 was only signed by 13 legal voters, because E. Bourgeois neither signed nor authorized her name to be signed to the petition and H. Henriksen was not a legal voter; and "that the number of legal voters of said district is now and was at all times herein re-

ferred to far more than three times the number of legal voters who signed said petition." The defendants allege and the relators deny that the petition from school district No. 25 contained one third of the legal voters in that district. As a part of their case, and almost at the very beginning of the trial, the defendants, in order "to show the number of legal voters in the district *prima facie*," offered, and the court received in evidence, an annual report for the year ending the third Monday in June, 1914, prepared by the clerk of school district No. 25, filed with the county school superintendent on July 15, 1914, showing the "number of legal voters for school purposes in district at time of making this report" to be 30. The relators met the "*prima facie*" case of the defendants by offering parol evidence that H. Henriksen was not a legal voter, that E. Bourgeois did not sign nor authorize her name to be signed to the petition, and that there were 41 legal voters in school district No. 25 when the petition was filed with the district boundary board. The defendants are now arguing that when the district boundary board ordered the election, that tribunal necessarily found the fact to be that the petition was signed by a sufficient number of legal voters; that parol evidence is not admissible in a *quo warranto* proceeding, except where fraud is alleged, to show the fact to be that a petition is not signed by a sufficient number of legal voters; that while this proceeding may be "a direct attack on the record sustaining the organization, it is a collateral attack upon a finding of fact," and hence the fact found by the district boundary board is conclusive here, and therefore parol evidence was not admissible to impeach that finding unless it is tainted with fraud.

1. Before undertaking to determine the question raised by the appellants, it may be helpful to make some further explanation of the record. The petition from school district No. 25 does not recite that it was signed by one third of the legal voters, and the accompanying certificate of the chairman and clerk only certifies that the petition "contains the legal voters, at school elections of this district, to the best of my knowledge and belief." The district boundary board did not make an express finding that the petition was in fact signed by one third of the legal voters, nor is it shown or even claimed that the board had any evidence of the number of legal voters except the petition and the remonstrance; and those two papers, when taken alone without further information, warned the board that the petition might not contain one third of the legal voters, and consequently, in the language of *State v. Woods*, 233 Mo. 357 (135 S. W. 932), an order calling an election would be "void for legal fraud and lack of jurisdiction" if the board had no information concerning the number of legal voters except the statements found in the petition and remonstrance and later developments revealed that the petition did not contain the names of one third of the legal voters.

2. The writ of *quo warranto* and information in the nature of *quo warranto* have been abolished by statute, and yet only the forms have been done away with, because the remedies which were obtainable under those forms are still available by an action at law which is prosecuted in the mode prescribed by legislative enactment: Section 363, L. O. L.; *State ex rel. v. Cook*, 39 Or. 377 (65 Pac. 89); *In re State v. Millis*, 61 Or. 245 (119 Pac. 763). Authority for the maintenance of this action is found in Section 366, L. O. L., where it is

provided that an action at law may be maintained in the name of the state:

"1. When any person shall usurp, intrude into, or unlawfully hold, or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation either public or private, created or formed by or under the authority of this state.

* * 3. When any association or number of persons act within this state, as a corporation, without being duly incorporated."

3. The defendants are asserting that school district No. 25 is a part of the union high school district, and before they can successfully meet the attack made by the complaint in this action they must allege all the facts necessary to show that school district No. 25 was legally annexed to the union high school district: 32 Cyc. 1453; High, Extra. Leg. Rem. (3 ed.), § 712. And the burden of proof rests upon the defendants to show that the two districts were legally consolidated: *State ex rel. v. Port of Tillamook*, 62 Or. 332, 336 (124 Pac. 637, Ann. Cas. 1914C, 483); *People v. Karr*, 244 Ill. 374 (91 N. E. 485); *People v. Baldrige*, 267 Ill. 190 (108 N. E. 49); *People v. McDonald*, 264 Ill. 514 (106 N. E. 501, Ann. Cas. 1915C, 31); 10 Ency. of Ev. 454.

4, 5. The election was void, and the attempted annexation comes to naught unless the petition from school district No. 25 was signed by "not less than one third of the legal voters": Section 4194, L. O. L. The petition is jurisdictional, and unless it is signed by "not less than one third of the legal voters," it is in legal contemplation no petition at all, and consequently an order calling an election on a petition which does not contain the required number of signers is like an order calling an election without any petition. The appellants argue, however, that the petition and the

order for the election of themselves prove the sufficiency of the former, because the latter necessarily implies that the board found the fact to be that the petition was signed by the required number of legal voters; and that while a *quo warranto* proceeding is a direct assault on whatever may be written in the record, it is nevertheless a collateral attack on the finding of fact which is implied from the order for the election. It is true that when the legality of a subsequent act depends upon the doing of a prior act, proof of the performance of the subsequent act may carry with it, until the contrary is shown, the presumption that the prior act was correctly done: *State v. Port of Tillamook*, 62 Or. 332, 339 (124 Pac. 637, Ann. Cas. 1914C, 483); *Anderson v. Stayton State Bank*, *post*, p. 357 (159 Pac. 1033); *Brownell v. Palmer*, 22 Conn. 107; 9 Ency. of Ev. 953. But this rule of presumption is not necessarily conclusive, and does not always bar the doors to truth when the truth is different from the presumption, for, as was said in *Knox County v. Ninth National Bank*, 147 U. S. 91 (37 L. Ed. 93, 13 Sup. Ct. Rep. 267):

“There is a marked difference between an omission to prove one step in a prescribed course of proceeding and evidence that such step was not taken.”

6. This action was commenced for the express purpose of showing that school district No. 25 was not legally annexed, and the single result sought to be accomplished is the annulment of an order without which the annexation is void, and therefore a direct attack is being made upon the order: *Morrill v. Morrill*, 20 Or. 96, 101 (25 Pac. 362, 23 Am. St. Rep. 95, 11 L. R. A. 155). Actions involving questions like the one presented here have been referred to or treated by this court as direct attacks: *State v. Port of Tillamook*,

62 Or. 332, 337 (124 Pac. 637, Ann. Cas. 1914C, 483); *Splonskofsky v. Minto*, 62 Or. 560, 571 (126 Pac. 15); *Bennett Trust Co. v. Sengstacken*, 58 Or. 333, 352 (113 Pac. 863); *School Dist. v. School Dist.*, 34 Or. 97, 99 (55 Pac. 98). See, also, *Tyree v. Crystal Dist. Imp. Co.*, 64 Or. 251 (126 Pac. 605). The same result has been reached in other jurisdictions: *People v. Barber*, 265 Ill. 316 (106 N. E. 798); *People v. Peoria*, 166 Ill. 517 (46 N. E. 1075); *People v. McDonald*, 264 Ill. 514 (106 N. E. 501, Ann. Cas. 1915C, 31); *State v. Woods*, 233 Mo. 357 (135 S. W. 932). Since this action is a direct attack upon the right to make the order, those who prosecute the attack can show that jurisdiction never attached, and for the purpose of showing the truth may offer evidence *dehors* the record: *People v. McDonald*, 264 Ill. 514 (106 N. E. 501, Ann. Cas. 1915C, 31); *People v. Stratton*, 33 Colo. 464 (81 Pac. 245); *Kamp v. People*, 141 Ill. 9 (30 N. E. 680, 33 Am. St. Rep. 270); *State v. Clark*, 75 Neb. 620 (106 N. W. 971); *Territory v. Armstrong*, 6 Dak. 226 (50 N. W. 832); *State v. Independent School Dist. of Carbondale*, 29 Iowa, 264; 32 Cyc. 1461; 2 Spelling, Inj. (2 ed.), § 1800.

The district boundary board is not a court of record, but at the most it is only an inferior tribunal with special and limited powers; the statute which prescribes the procedure for annexing territory to a union high school district does not expressly provide for a hearing on the petition, and makes no mention of an appeal from an order for an election, so that there is no room to claim that another adequate remedy besides *quo warranto* is available; and the attack made here strikes at the right of the board to act at all and not at the correctness or wisdom of a decision which the board has made after jurisdiction is indubitably con-

ferred. These features readily distinguish the instant case from authorities relied upon by defendants like *State v. Briggs*, 45 Or. 366 (77 Pac. 750, 78 Pac. 361, 2 Ann. Cas. 424); *State v. Port of Bay City*, 64 Or. 139 (129 Pac. 496); *Stettler v. O'Hara*, 69 Or. 519 (139 Pac. 743, Ann. Cas. 1916A, 217); *Louisville Co. v. Garrett*, 231 U. S. 298 (58 L. Ed. 229, 34 Sup. Ct. Rep. 48); *State v. Houser*, 122 Wis. 534 (100 N. W. 964); *Chicago Co. v. Babcock*, 204 U. S. 585 (51 L. Ed. 636, 27 Sup. Ct. Rep. 326); *Rate Cases*, 234 U. S. 476 (58 L. Ed. 1408, 34 Sup. Ct. Rep. 986); *Bridge Co. v. United States*, 216 U. S. 177 (54 L. Ed. 435, 30 Sup. Ct. Rep. 356); *Howell v. Howell*, 151 N. C. 575 (66 S. E. 571); *People v. Waite*, 213 Ill. 421 (72 N. E. 1087). See, also, *Gill v. Commissioners*, 160 N. C. 176 (76 S. E. 203, 43 L. R. A. (N. S.) 293), for an explanation of *Howell v. Howell*, 151 N. C. 575 (66 S. E. 571), and 32 Cyc. 1425, for a statement of the holding in *People v. Waite*, 213 Ill. 421 (72 N. E. 1087). Quite a different question is presented when an assault is made upon an order or judgment or a court of record, or where another complete remedy is available, or when the attack is against the wisdom of a finding made by an officer or tribunal after jurisdiction has actually attached. Here the complainants strike directly against the right to make the order claiming that jurisdiction was never conferred; and they can go behind the record and show the truth. The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and MR. JUSTICE BURNETT CONCUR.

Motion to dismiss appeal denied September 21, 1915.
Argued on the merits September 14, modified October 17, rehearing
denied November 27, 1916.

ST. MARTIN v. HENDERSHOTT.*

(151 Pac. 706; 160 Pac. 373.)

Appeal and Error—Record on Appeal—Transcript of Evidence.

1. An appeal will not be dismissed in an equity case, although the transcript of the testimony is not sent up, since the question of the sufficiency of the complaint may nevertheless be considered.

Appeal and Error—Record on Appeal—Time of Filing.

2. Although an abstract on appeal was not filed within the time allowed by law, the appeal would not be dismissed where the appellant showed no disposition to delay the hearing.

Appeal and Error—Review—Matters Reviewable.

3. On motion to dismiss an appeal, the objection that the transcript and abstract do not intelligibly present any question to be decided will not be considered.

ON THE MERITS.

Death—Presumption of Death from Absence—Statute.

4. By Section 799, subdivision 26, L. O. L., there is a presumption that a person, not heard from by his acquaintances or any members of his family for more than seven years, is dead.

[As to presumption of death, see notes in 91 Am. Dec. 526; 92 Am. Dec. 704; 46 Am. Rep. 761; 104 Am. St. Rep. 198.]

Tenancy in Common—Adverse Possession—Sufficiency of Evidence.

5. In suit between cotenants, to set aside a decree and to partition real property, evidence held insufficient to substantiate defendants' allegation of title by adverse possession with the degree of certainty required between tenants in common.

Tenancy in Common—Possession of Cotenant—Presumption.

6. Possession by one tenant in common is presumed to have been in the interest of all others.

Limitation of Actions—Statute of Limitations—Six-year Claim.

7. In an action between cotenants to set aside a decree affecting plaintiff, and to partition real property, where defendants claimed for half the taxes admitted to have been paid by them, the allowance, as an offset to plaintiff, of half the sum of \$250 expended by her in securing patent for the land more than six years before, was error; the statute of limitations as to such claims having run before suit was instituted.

*The question of presumption of death from seven years' absence is discussed in notes in 2 L. R. A. (N. S.) 809; 23 L. R. A. (N. S.) 178; L. R. A. 1915B, 729.

Partition—Improvements.

8. In suit between cotenants to partition real property, plaintiff, who made improvements on the land, building an addition to the house, which was burned, could derive no benefit therefrom.

Partition—Improvements.

9. In suit between cotenants to partition the land, no allowance will be made plaintiff for trivial improvements.

From Marion: **WILLIAM GALLOWAY**, Judge.

This is a suit by Margaret St. Martin against William M. Hendershott, Libbie E. Hendershott and Napoleon Legault, in which the plaintiff obtained a decree and defendants appeal. Plaintiff now moves to dismiss the appeal. **MOTION DENIED.**

Mr. John Bayne and Messrs. Richards & Richards, for the motion.

Mr. Horace B. Nicholas, Mr. W. C. Nicholas and Mr. R. W. Nicholas, contra.

In Banc. **MR. JUSTICE ELKIN** delivered the opinion of the court.

The plaintiff moves to dismiss the appeal for the reasons: (1) That the record shows that this appeal is from a decree, and the testimony, depositions and other papers containing the evidence, etc., do not accompany the transcript; (2) that the defendants failed to file their abstract within 20 days from the filing of the transcript as required by the rules of this court; and (3) the transcript and abstract do not intelligibly present any question to be decided by the court.

1. The transcript in this case consists of certified copies of the decree, notice of appeal and undertaking. This is just such a transcript as is prescribed by Section 554, L. O. L., as amended by Laws of 1913, p. 618, and is sufficient to give the court jurisdiction; but in

equity cases the transcript of the testimony must accompany the transcript. This question of dismissing an appeal for the reason that it was not accompanied by the testimony was before this court in *Neal v. Roach*, 61 Or. 513 (107 Pac. 475), and the court said:

“When an appeal from a decree in a suit in equity which is to be tried anew on the testimony, and no transcript thereof has been sent up, the only question that can be considered is: Does the complaint state facts sufficient to constitute a cause of suit? *Howe v. Patterson*, 5 Or. 353; *Wyatt v. Wyatt*, 31 Or. 531 (49 Pac. 855); *Morrison's Estate*, 48 Or. 612 (87 Pac. 1043). The sufficiency of the complaint, though not now challenged, is never waived, and may be objected to at the trial in this court, and, this being so, the motion to dismiss should be denied, and it is so ordered.”

2. The defendants did not file their abstract within the 20 days allowed, but, as their action does not show any disposition to delay the hearing, we think they should be excused for the few days delay in its filing.

3. When the case comes up for hearing the third objection may have merit, but that cannot be considered on a motion to dismiss the appeal.

MOTION DENIED.

Modified October 17, 1916.

Rehearing denied November 11, 1916.

ON THE MERITS.

(160 Pac. 373.)

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit to set aside a decree so far as it affects the plaintiff, Margaret St. Martin, and to partition real

property. It is alleged in the complaint, in effect, that the plaintiff is the owner in fee and in the possession of an undivided one half of lots 1, 2, 3 and 4 in Section 21, township 4 south, range 1 west, of the Willamette Meridian; that the defendant Libbie E. Hendershott is the owner of the other moiety thereof; that the defendant William M. Hendershott is the husband of Libbie E., and has no interest in the land, except an inchoate right of curtesy; that the defendant Napoleon Legault holds a mortgage upon Mrs. Hendershott's interest in the premises; that in a former suit, wherein John Arquette, Michel Arquette and Margaret St. Martin, the plaintiff herein, were plaintiffs and William M. Hendershott and Libbie E. Hendershott, the defendants herein, were defendants, it was decreed that those defendants were the owners in fee simple of the entire premises, hereinbefore described, and that their title thereto was quieted as against each of such plaintiffs; that the plaintiff herein never engaged an attorney to represent her in that suit, nor did she know that she had been made a party thereto; that the attorney, naming him, who instituted the suit fraudulently neglected to appear at the trial, and the decree referred to was permitted to be given, of which this plaintiff had no knowledge until after the time to take an appeal had elapsed.

The answer admits that William M. Hendershott and Libbie E. are husband and wife; that the latter is the owner of an undivided one half of the premises; that Legault holds a mortgage upon the land; and that the decree referred to was entered. It is further substantially averred that the plaintiff ought to be estopped to controvert the validity of such decree. For another defense it is alleged that William M. and Libbie E. Hendershott are the owners in fee of the entire tract

of land described in the complaint; that they have been in the actual, open, notorious, exclusive and adverse possession of the whole of such premises for more than ten years prior to the commencement of this suit, holding the land adversely to the plaintiff and to all other persons; and such defendants have paid the entire taxes imposed upon the real property for the years 1911, 1912 and 1913, amounting to \$256.36, no part of which has been repaid.

The reply denied all the allegations of new matter in the answer, except that Mrs. Hendershott was the owner of an undivided half of the land and the payment of the taxes stated. For a further reply it is alleged that in perfecting the title to the real property the plaintiff had paid out more than \$250, which sum should be offset against the taxes so paid. The cause was tried, and from the testimony received the court made findings of fact and of law, and, based thereon, granted the relief prayed for in the complaint, and appointed referees to partition the land. From this decree the defendants appeal.

MODIFIED. REHEARING DENIED.

For appellants there was a brief over the names of *Mr. Horace B. Nicholas, Mr. W. C. Nicholas* and *Mr. R. W. Nicholas*, with oral arguments by *Mr. Horace B. Nicholas* and *Mr. W. C. Nicholas*.

For respondent there was a brief over the names of *Mr. John Bayne* and *Messrs. Richards & Richards*, with oral arguments by *Mr. Bayne* and *Mr. O. R. Richards*.

Opinion by MR. CHIEF JUSTICE MOORE.

An examination of a transcript of the testimony convinces us that the former suit was instituted and

tried, and the decree rendered therein, without the plaintiff's consent, and that she had no knowledge thereof until the time for taking an appeal had expired.

4-6. Considering the defendants' alleged title to the entire premises by adverse possession, the evidence discloses that on July 10, 1896, a patent was issued by the United States to the heirs of Margaret Arquette, successors in interest of Louis Forcier, granting to them the real property described in the complaint. It also appears that the heirs of Margaret Arquette are her sons John, Michel, Amab and Isaac, and her daughter, Margaret, the plaintiff herein. Isaac Arquette, so far as known, had no lineal descendants, and since he has not been heard from by his acquaintances or any members of his family for more than seven years, he is therefore presumed to be dead: Section 799; subd. 26, L. O. L. Mrs. St. Martin, Mr. Hendershott and his wife, indulging this presumption, conclude the land should be apportioned to the known surviving heirs, thereby giving to each originally an undivided one-fourth of the premises. John Arquette and his brother Michel, in the year 1889 delivered possession of the real property to Hendershott, to whom on October 19, 1891, they executed a special warranty deed, purporting to convey all such land. This deed was recorded February 8, 1892. Notwithstanding the patent from the United States, evidencing a grant of the lands, was not issued until July 10, 1896, a tax was attempted to be imposed on the premises the preceding year, and by reason of the nonpayment thereof the real property was sold to P. H. Marley, and, no redemption having been made, the sheriff, on December 12, 1898, executed to the purchaser a tax deed. Marley on December 30, 1902, conveyed whatever interest he so obtained to H. L. Sagsvold. Mrs. St. Martin com-

menced an action of ejectment against Sagsvold, and obtained a judgment against him January 16, 1909, wherein it was determined she was the owner in fee simple and entitled to the immediate possession of an undivided one fourth of the real property described herein. Amab Arquette, on August 4, 1909, executed to Mrs. St. Martin a deed, conveying to her all his interest in the premises. Mrs. Hendershott, having become vested with all the title her husband had in the land, commenced a suit, February 16, 1912, against Mrs. St. Martin, alleging in the complaint that they were "tenants in common and in possession of the following described tract of land in said Marion County, Oregon, viz.," specifying the lots, section, township, range and meridian, "each owning an undivided half thereof."

Mr. Hendershott testified that he lived on the land until September, 1896, when his tenants took and held possession for him until September, 1901, when the house on the premises was burned before the ten years' adverse possession had fully run, but that Mrs. Edna Carpenter, who was then occupying the building in his right, left in another domicile on the land some household goods which she did not remove until the following January, thereby completing the full measure of the statute of limitations. He explains his several ineffectual attempts to purchase Mrs. St. Martin's interest in the real property by stating upon oath that he did not then know Mrs. Carpenter's possession fully completed the prescribed limit, thereby defeating the plaintiff's right.

It is argued by defendant's counsel that the deed, executed by John Arquette and his brother Michel to Mr. Hendershott, purporting to convey the entire premises, having been duly recorded, thereby imparted

to the plaintiff notice of the grantee's assertion of a claim to the whole tract of land, and that since the statute of limitations had fully run before he applied to purchase her interest in the real property, his mistake of fact does not prevent an enforcement of his right, and, such being the case, an error was committed in granting the relief awarded. We do not deem it necessary to consider the legal principles thus asserted, for an examination of the testimony leads to the conclusion that until the suit was instituted by John Arquette and others against Mr. and Mrs. Hendershott, they never intended to claim or assert a title by adverse possession. This deduction is manifest from an examination of the averments of the complaint in the suit brought by Mrs. Hendershott against Mrs. St. Martin to partition the land. It is also apparent from the cross-examination of Mr. Hendershott, who was asked:

"Now, you and Mrs. Hendershott don't want to claim more than that half" of the land "now do you"?

He replied:

"Yes.

"Q. Why?

"A. Because, when they started in to beat us out of our share, we were going to fight on adverse possession; never would have been any question if they hadn't attacked our rights there—not one bit; there is absolutely no question."

On redirect examination of this witness the defendants' counsel, referring to the period of limitation and to the land, inquired:

"During the ten years did you claim to own it?"

He answered:

"Why, I had a deed to the whole thing.

"Q. And you claimed to own it?

"A. Yes, sir."

Notwithstanding it might be inferred from the last reply that such a claim had been put forth during the entire period, we do not think the allegation of title by adverse possession has been substantiated with that degree of certainty that is required between tenants in common, the possession of one of whom is presumed to have been in the interest of all others: *Northrop v. Marquam*, 16 Or. 173 (18 Pac. 449); *Morrill v. Morrill*, 20 Or. 96 (25 Pac. 362, 23 Am. St. Rep. 95, 11 L. R. A. 155); *Wheeler v. Taylor*, 32 Or. 421 (52 Pac. 183, 67 Am. St. Rep. 540); *Beers v. Sharpe*, 44 Or. 386 (75 Pac. 717).

7. The plaintiff testified that in securing a patent for the land and thus obtaining a legal title to the premises she was obliged to expend the sum of \$250, one half of which the defendants agreed to refund, but that they had not paid any part thereof. It will be remembered the reply seeks to offset such part against the claim for one half the taxes, which is admitted in that pleading to have been paid by the defendants. The patent was obtained in 1896, and more than six years, the limit of the statute in such claims, had run against the demand before this suit was instituted. That claim was therefore barred, and an error was committed in allowing any part of it as an offset.

8, 9. The testimony shows that the plaintiff made some improvements upon the land, the chief of which was an addition to the house; but, as this building was burned, the plaintiff can now derive no benefit therefrom. The other improvements were trivial, and no allowance will be made therefor.

For the error committed in offsetting the plaintiff's claim against that of the defendants, the decree is modified so as to require her, as a condition precedent

to partition of the premises, to pay to the defendants one half of \$252.36, the sum laid out by them on account of taxes.

In all other respects the decree is affirmed.

MODIFIED. REHEARING DENIED.

MR. JUSTICE BEAN, MR. JUSTICE BENSON and MR. JUSTICE MCBRIDE concur.

Argued October 4, affirmed October 24, rehearing denied November 11, 1916.

GILES v. ROSEBURG.

(160 Pac. 543.)

Municipal Corporations—Assessment for Public Improvements—Extras.

1. Under a city charter authorizing the council to levy an assessment on lands specially benefited to pay the whole or any part of the expense of a public improvement, but making no specific provision for assessment to pay the incidental expenses of such improvement, the amount paid the city engineer for superintendence and the amount paid for the abstract of the property owners and the clerical work of preparing the assessment cannot be included in the assessment for the improvement.

[As to purposes for which a municipal corporation may levy an assessment, see note in 16 Am. St. Rep. 365.]

Municipal Corporations—Assessment for Public Improvements—Interest.

2. Under a city charter providing that all general or special taxes levied for public improvements should bear interest at the legal rate from the time they are delinquent, the interest on warrants drawn in favor of contractors for a public improvement from the date of such warrants until the assessment was levied and the lien attached is not chargeable against the property owners.

From Douglas: GEORGE F. SKIPWORTH, Judge.

This is a suit by E. L. Giles (substituted for Ida C. Giles), I. S. Ketch, W. H. Park, E. H. Lenox, Emma J. Lenox, Lucie Ingels, F. C. Flagler, O. C. Brown and

A. J. Geddes against the City of Roseburg, Carl E. Wemberly, city recorder, T. J. Williams, city marshal, and Agnes M. Pitchford, city treasurer, of the City of Roseburg, to enjoin the enforcement of part of a special assessment. There was a decree in favor of plaintiffs, from which the defendants appeal.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief over the names of *Mr. Carl E. Wemberly* and *Mr. Albert Abraham*, with an oral argument by *Mr. Wemberly*.

For respondents there was a brief and an oral argument by *Mr. A. N. Orcutt*.

Department 1. Opinion by MR. CHIEF JUSTICE MOORE.

This is an appeal by the defendant from a decree enjoining the enforcement of that part of a special assessment which undertook to impose upon the several tracts of real property in a designated district, asserted to have been benefited by a street improvement, the following charges: For engineering, \$350; for interest, \$108.37; for an abstract, \$15.75; and for clerical work, \$21.81. The question to be considered is whether either of these items constitutes a valid charge against the real property affected by the improvement.

1. In *Smith v. City of Portland*, 25 Or. 297 (35 Pac. 665), it was held that in the absence of a provision in an ordinance authorizing a public improvement, or a general provision in a city charter, extras or incidentals incurred in making the improvement could not be charged against the property benefited. Section 66 of the charter of the City of Roseburg declares:

“The common council shall have power * * to levy and collect assessments upon all lots and parts of

lots and parcels of land specially benefited by such improvements for the purpose of defraying the whole or any part of the cost and expense thereof."

It appears from the testimony that the defendants' engineer does not receive a regular salary, but is paid a stated daily compensation for the services which he renders. He received in this instance, as evidence of the remuneration due him for superintending the improvement, warrants drawn on the general fund, and not upon the fund arising from the special assessment. We have been unable to find any clause in the charter or in the ordinance under which the improvement was made that expressly authorizes the imposition of any part of the engineer's charges against the property benefited. When it is kept in mind that the levy of a special assessment is a proceeding *in invitum*, and that the authority in this instance to impose upon the real property the burden of the engineer's charges for supervising the work is not apparent from an inspection of the charter or the ordinance under which the improvement was made, so that the owners of the land would have proper notice of the cost of the extra work, the court properly excluded the item of \$350 as an incidental incurred in making the improvement.

What has been said with respect to the engineer's charges will apply with equal reason to the items of \$15.75 for an abstract, showing the names of the owners of real property affected by the improvement, and \$21.81 for clerical work in making up the assessment so as to lay upon each tract of land benefited by the improvement its ratable share of the cost thereof. These items were also properly excluded.

2. The testimony shows that warrants were drawn in favor of the contractors for the value of installments of the work as they were performed, and interest on

these warrants, \$108.37, was charged for the alleged detention of the money by reason of the nonpayment of the assessment. In *Mall v. City of Portland*, 35 Or. 89, 93 (56 Pac. 654, 655), Mr. Justice BEAN observes:

"It is the universal rule that a special assessment, like the one in question, does not bear interest unless the law so provides."

Section 97 of the charter of Roseburg reads:

"All general or special taxes levied, as provided and authorized in this act, and all assessments for the improvements, widening, or repairing of streets or alleys, or for laying sewers or drains, and every part thereof, shall bear interest at the legal rate from the time it is delinquent until paid or collected."

It appears that no assessment was made for the improvement until five months after it was finished. Until an owner of the real property benefited could tell with certainty what sum he should pay as his share of the burden imposed, he could not be delinquent in withholding his part of the assessment. He was therefore not chargeable with interest until the lien attached. No error was committed in excluding that item.

The decree should therefore be affirmed, and it is so ordered.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE McBRIDE concur.

Argued September 26, reversed and remanded October 24, rehearing denied November 28, 1916.

TOOMEY v. CASEY.*

(160 Pac. 583.)

Evidence—Secondary Evidence—Admissibility.

1. The contents of a written instrument which the opposite party did not produce on demand cannot be established by testimony as to the witnesses' conclusion as to its legal effect, but its language must be given so that the court may determine its legal effect.

Evidence—Documentary Evidence—Secondary Evidence.

2. Section 712, L. O. L., declares that there shall be no evidence of the contents of a writing other than the writing itself, save when the original is in possession of the party against whom the evidence is offered, and he withholds it after demand, etc., while Section 782 declares that the original writing shall be produced and proved unless it be in the custody of the adverse party and he fails to produce it after reasonable notice, in which case evidence of the contents is admissible. *Held* that, in an action against his lessees, whom plaintiff claimed had assigned their lease to a third person, a notice on the lessees to produce the assignment does not warrant the introduction of secondary evidence, for it must be presumed that the assignment would be in the possession of the assignee.

Landlord and Tenant—Lessees—Assignees.

3. Under Section 705, L. O. L., declaring that the rights of a party cannot be prejudiced by the declaration, act or omission of another except by virtue of a particular relation between them, lessees cannot be held to have exercised an option to extend a lease by reason of the acts of their alleged assignee, where the assignment was not established.

Landlord and Tenant—Subletting—Effect.

4. Where lessees sublet premises under an instrument giving the sublessee the right to hold over for an extended period, in case the lessees should exercise their option to extend the lease, the sublessee cannot exercise the option and bind the lessees for the period of the extension.

[As to subletting of leased premises, see note in 117 Am. St. Rep. 91.]

From Multnomah: ROBERT G. MORROW, Judge.

Department 2. Statement by MR. JUSTICE BURNETT.

This is an action by J. M. Toomey against J. D. Casey and J. H. Hutchinson, and comes here on a sec-

*For authorities passing on the question of effect of calling for and inspecting document to make it competent evidence, see note in 33 L. R. A. (N. S.) 552.

ond appeal, a judgment of the Circuit Court having been reversed by an opinion written by Mr. Justice BEAN and reported in 72 Or. 290 (142 Pac. 621). It is admitted that at the dates of the transactions involved herein the plaintiff was the owner of an undivided half and the two defendants owned the other undivided half of a 25-year leasehold interest in some real property in Portland, upon which was situated a three-story and basement building known as the Barr Hotel. It is agreed that on May 26, 1911, the plaintiff leased to his cotenants his interest in the premises, "to have and to hold the same to the parties of the second part for the term of six months from the first day of June, 1911, with the option and privilege upon the parties of the second part for forty-two months beginning with the expiration of the said six months' period," at the monthly rental of \$600 during said 6 months and at the same rate during the period of 42 months, "provided the said parties of the second part shall elect to exercise such option and privilege hereby granted and keep, occupy and possess the same during the said forty-two months."

The complaint alleges:

"That in pursuance of said lease the defendants entered into possession of said premises and ever since have been and still are in possession thereof; that at the termination of the period of 6 months mentioned in said lease the defendants exercised the option and privilege given to them therein and renewed said lease for the remaining period of 42 months therein specified."

The plaintiff states what he claims has been paid by the defendants on account of the rent and, after deducting what he avers has accrued for the use of

the premises under the contract, demands judgment for \$10,031.42, with interest and costs.

The answer traverses the entire complaint except as otherwise stated. After setting out the tenancy in common existing between the plaintiff and themselves, the defendants claim to have overpaid him for the 6-month term named in the lease, and aver that prior to the expiration of that period they informed him that they would not exercise the privilege, or option, given to them in the lease to continue the same for the 42 months mentioned therein, or for any time after December 1, 1911. They also say they have never since that day occupied the premises under the terms or provisions of the lease between the parties, but that since the expiration of the 6-month term they have been in possession as tenants in common with the plaintiff, and at his request have managed the property to the best interests of all parties. They state an account of the income and expenses in that behalf. They declare, also, that on May 18, 1912, all the plaintiff's interest was sold under an execution against him, and deduce therefrom the conclusion that he is not entitled to any income from the premises since that date.

The tenancy in common and the execution of the lease are admitted by the reply, but otherwise the allegations of the answer are materially traversed. The Circuit Court, hearing the case without a jury, found, among other things, that on or about November 1, 1911, and before the expiration of the 6-month period, the defendants each informed the plaintiff that they would not exercise the option given in the lease to renew the same, and would not hold his half interest under the terms of the demise after the end of the six months. There was also a finding to the

effect that at this juncture the parties entered into negotiations for a new agreement covering the 42 months mentioned, whereby the defendants should make certain improvements in the property, advancing the money therefor, plaintiff's part of which was to be deducted from the rentals coming to him, and that a new lease at \$500 per month for plaintiff's half interest should be executed, all on condition that the defendants furnish him satisfactory security for the payment of arrears of rent and what should accrue under the proposed arrangement, but that the condition as to the security was never met by the defendants, and the new lease was never executed. The court then made the following finding:

"That the defendants, upon the expiration of the said 6-month period mentioned in said lease, elected to exercise, and did exercise, the option and privilege contained in said lease, to extend the said lease for a further period of 42 months, and did keep and occupy, and possess the said premises after the expiration of said 6-month period, and ever since, and during all the times involved in this action, have occupied and possessed the plaintiff's interest, in said premises described in said lease, under and by virtue of the same, and the extension thereof aforesaid."

From a judgment for the plaintiff, the defendants appeal.

REVERSED AND REMANDED. REHEARING DENIED.

For appellants there was a brief and an oral argument by *Mr. Leroy Lomax*.

For respondent there was a brief and an oral argument by *Mr. Bardi G. Skulason*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. On the former appeal the plaintiff based his contention upon the acts and declarations of Leroy Lomax to bind the defendants; but in default of proof that they had authorized him to act as their agent in the matter relied upon by the plaintiff, the decision of the Circuit Court was reversed in a well-written opinion by Mr. Justice BEAN. The record at present before us reveals that at the second trial the plaintiff abandoned the theory of agency, and now counts upon showing that the defendants assigned to Lomax their interest in the lease, that he, as such assignee, held over after the expiration of the term, and that this amounts to an election on their behalf to continue the lease for the additional period of 42 months. The whole controversy turns upon whether there is any evidence to support finding No. 10 quoted above. As before, the plaintiff insists upon holding the defendants by virtue of the conduct of Lomax, and, in lieu of showing that the latter was the agent of the defendants, shifts his ground and undertakes to prove an assignment by them of their lease, so as to make the actions of the assignee after the expiration of the term obligatory upon the tenants of the plaintiff. It seems that plaintiff served a notice on the defendants to produce the alleged assignment from them to Lomax of their interest under the lease, claiming that there was an instrument in writing of that purport. At the hearing, when the defendants were called upon to comply with the notice, they answered substantially that they had no such document, and that no such instrument had ever existed. They did, however, produce and put in evidence a lease of the premises dated May 27, 1911, from themselves to

Lomax and one Taylor, having appended thereto a writing signed by the latter June 30, 1911, selling, assigning and transferring all his interest therein to Lomax. The plaintiff then called witnesses, himself included, for the purpose not only of proving the existence of the alleged writing, but also the contents thereof. The utmost that any of them could say was that there was an assignment indorsed upon or attached to one of the copies of the lease, upon which plaintiff counts, transferring the interest of the defendants to Lomax. No one pretends to give the date or the language of the instrument. The most that can be said of the testimony on this point is that the witnesses gave their conclusion as to the legal effect of the document. What is required in instances of this sort is that the contents or language of the instrument shall be established leaving to the court the duty, as in all such cases, of declaring what effect in law may be attributed to the document in question.

2. Moreover, there was no showing that the assignment mentioned in the notice to be produced had ever been in the custody or control of the defendants after its execution, if indeed, it was executed. Naturally, it would be in possession of the assignee, who would be subject to a subpoena *duces tecum* for the purpose of getting it in evidence. Our Code has laid down these rules on that subject:

“There shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases: (1) When the original is in the possession of the party against whom the evidence is offered, and he withholds it under the circumstances mentioned in Section 782; (2) when the original cannot be produced by the party by whom the evidence is offered, in a reasonable time, with proper diligence,

and its absence is not owing to his neglect or default": Section 712, L. O. L.

Section 782, L. O. L., referred to in the section just quoted, reads thus:

"The original writing shall be produced and proved except as provided in Section 712. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss; but the notice to produce it is not necessary where the writing itself is a notice, or where it has been wrongfully obtained or withheld by the adverse party."

A litigant cannot evade these provisions of the statute by a mere notice to produce, unless there is something to be produced, which is in the custody of the adverse party. The Oregon precedents on this subject are collated by Mr. Justice McNABY in *Jones v. Teller*, 65 Or. 328, 333 (133 Pac. 354). Mr. Justice RAMSEY wrote to the same effect in *Parker v. Smith Lumber Co.*, 70 Or. 41 (138 Pac. 1061). There was no valid reason for showing the contents of the instrument by parol, even if the oral testimony had disclosed them. For these reasons, the alleged assignment and its after effect upon the defendants must be laid out of the case.

3. This leads to the conclusion that there was an utter failure of proof that the defendants put Lomax into their place by conveying to him their interest in the lease. His actions, therefore, are devoid of the sanction of an assignment whereby they would affect the defendants and impute to them an election to extend the term of the lease. It is said in Section 705, L. O. L., that:

“The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them.”

The plaintiff has endeavored to establish this particular relation between the defendants and Lomax by charging that there was a writing, conveying to the latter the interest of the defendants in the lease they held from the plaintiff. In default of the production of the document he essayed to give evidence of its contents, but only went so far as to disclose the version given by the witnesses of its legal effect. The quest was not for the opinion of the witnesses concerning the construction to be given to the paper. They were called upon for its language. Characterizing it as an “assignment” falls short of proof of the contents of the instrument, and is not sufficient to establish it. Under these circumstances finding No. 10 is rather a conclusion of law than a finding of fact. With the plaintiff’s failure to establish the contents of the transfer from the defendants to Lomax, if any there was, falls his effort to charge the defendants with his acts and conduct. In the absence of further showing, his doings amount to no more than those of an interloper or trespasser.

4. Besides the original lease from the plaintiff to the defendants there is in evidence a lease from the latter as parties of the first part, to Lomax and Taylor, as parties of the second part, for the premises in question, the *habendum* clause of which reads thus:

“To have and to hold the same unto the parties of the second part for the term of six months from the first day of June, 1911, with the option and privilege upon the parties of the second part for forty-two months beginning with the expiration of the said six months’ period, provided always that the said parties of the first part [defendants here] elect to keep and

hold said building for the said forty-two month period under their lease for a half interest from one J. M. Toomey."

Without dispute the evidence shows that Taylor assigned his interest to his cotenant, Lomax. This admitted lease describes the relationship existing between the defendants and Lomax. It clearly shows that his right to continue in the premises depended entirely upon their election to renew the lease. The court expressly found that they had declined to do this. Their refusal to continue the lease after the expiration of the 6 months of itself cut off all authority or right of Lomax to bind them by remaining in possession himself if he did so. His tenancy could not rise higher than its source, nor be continued in contradiction of the terms of the instrument under which he held. In considering the undisputed documentary evidence before him the learned Circuit Judge drew from the actions of Lomax an erroneous conclusion embodied in finding No. 10, which, as already stated, is really one of law rather than of fact. The conduct of the defendants was referable to their character as tenants in common as stated by Mr. Justice BEAN in the former opinion, which is the law of the case. The burden was upon the plaintiff to establish a different relationship. This he did not succeed in doing, and there is no evidence legally to support the finding of fact No. 10, already mentioned. The judgment is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

Motion to dismiss appeal allowed November 28, 1916.

**YAMHILL SANITARY PUBLIC MARKET CO. v.
STROWBRIDGE.**

(161 Pac. 98.)

Appeal and Error—Abstract of Record—Failure to File.

1. Where no abstract was filed within 20 days after the transcript was filed as required by Supreme Court Rule VI (56 Or. 616, 117 Pac. ix), and no reason given for the neglect, an appeal will be dismissed upon motion.

From Multnomah: **GEORGE N. DAVIS**, Judge.

This is an action by the Yamhill Sanitary Public Market Company, a corporation, against Joseph Strowbridge and the Strowbridge Estate Company, a corporation, in which judgment was rendered in the lower court in favor of defendants, and plaintiff appeals.

Respondents move to dismiss the appeal upon the ground stated in the opinion of the court.

APPEAL DISMISSED.

Mr. H. W. Strong, for the motion.

Mr. Guy C. H. Corliss, contra.

Opinion PER CURIAM.

An appeal from a judgment rendered in this action against the plaintiff, a corporation, for the costs and disbursements was taken and perfected by it. The transcript was filed with our clerk July 8, 1916, but no abstract has been filed as required by Rule VI, of this court (56 Or. 616, 117 Pac. ix). The defendants' counsel, as soon as they learned of the default, moved upon notice to dismiss the appeal on account of that

failure. No reason has been assigned or excuse given for the neglect.

Upon the authority of *Swanson v. Leavens*, 26 Or. 561 (40 Pac. 230), *Close v. Close*, 28 Or. 108 (42 Pac. 128), and *Morrison v. Hall*, 55 Or. 243 (104 Pac. 963), the appeal is dismissed.

DISMISSED.

Argued November 27, demurrer sustained November 28, 1916.

STATE EX REL. v. MACY, CITY ATTORNEY.*

(161 Pac. 111.)

Time—Computation—Days—Statute.

1. Under Section 531, L. O. L., providing that the time within which an act is to be done shall be computed by excluding the first day and including the last, etc., the filing of an initiative petition and proposed ordinance completed on November 4, 1916, to be acted upon at the election of December 4, 1916, having been filed only 29 days before December 4, 1916, did not comply with an ordinance requiring such petition to be filed 30 days before the election at which a proposed ordinance or amendment to the city charter is to be submitted or referred.

[As to computation of time, see notes in 7 Am. Dec. 250; 46 Am. Rep. 410; 78 Am. St. Rep. 872.]

Original proceeding in Supreme Court.

Department 2. Statement by MR. JUSTICE BEAN.

This is a *mandamus* proceeding by the State of Oregon, on the relation of Josie L. Stewart, to compel Bert Macy, as city attorney, and Charles F. Elgin, as city recorder of the City of Salem, to prepare the ballot title of a certain measure, and to cause it to be printed on the official ballot to be voted at the general election of the city on December 4, 1916.

*Upon the question of general rule as to inclusion or exclusion of first and last days in computation of time, see notes in 49 L. R. A. 193; 15 L. R. A. ((N. S.) 686.

On October 24, 1916, the common council of the City of Salem passed an ordinance amendatory to the one theretofore enacted, entitled:

"An ordinance to provide for carrying into effect the initiative and referendum powers reserved to the legal voters of municipalities by Section 1a, Article IV, of the Constitution of the State of Oregon, and the power to enact and amend their municipal charters reserved to the legal voters of the cities and towns by Section 2, Article XI, of the Constitution of the State of Oregon, to provide for the number of signers necessary for initiative and referendum petitions, to fix the time within which referendum petitions may be filed and ordinances become effective, to provide the time which must elapse before measures referred may be voted upon, and to provide a mode of procedure for submitting municipal measures to the people by the common council, and to repeal Ordinance No. 509, approved March 26, 1907, and to repeal Ordinance No. 685, approved June 28, 1909, and to repeal Ordinance No. 818, approved June 21, 1910."

This ordinance was numbered 1464, and approved by the mayor of the city on October 25, 1916. Among other provisions it required that initiative petitions for the amendment of the charter should be signed by a number of the legal voters equal to 15 per cent of the votes cast at the last preceding city election and filed with the city recorder "not later than 30 days before the next regular city election at which such proposed ordinance or amendment is to be submitted or referred."

The alternative writ recites, among other things, that an initiative petition and proposed measure, a copy of which is thereto annexed and marked Exhibit "A," signed by the requisite number of qualified and registered voters of the city in proper form and duly verified, was filed with the city recorder "on and be-

tween November 2, 1916, and November 4, 1916," and that the next general election of the city occurs on December 4, 1916. The writ further shows a compliance in other respects with the requirement for the initiation of an amendment to the city charter.

DEMURRER TO WRIT SUSTAINED.

Mr. Bert W. Macy, in pro. per., for the demurrer.

Mr. Samuel T. Richardson, contra.

MR. JUSTICE BEAN delivered the opinion of the court.

1. The city officers demur to the alternative writ for the reason that it does not state facts sufficient to constitute a cause of action or entitle the relator to the relief sought therein. The former ordinance of the City of Salem provided that such an initiative petition should be filed with the recorder 60 days prior to the election at which the measure was to be voted upon. It is the contention on the part of the city that the initiative petition was not filed with the city recorder within the time provided by law. It is insisted that the ordinance amending the former ordinance and reducing the time for filing such petition to 30 days before the election did not go into effect until 10 days after the same was approved by the mayor, or until November 6, 1916, and therefore there was not time for a compliance with the terms thereof before the election on December 4th, and that the petition was not filed within the time allowed. The contrary is maintained by counsel for plaintiff. That the city council may ordain provisions for the carrying into effect of the initiative and referendum powers reserved to the legal voters of a municipality is well

settled and unquestioned. Assuming without deciding that the ordinance approved October 25th is in force, the date of the election at which it is desired to have the initiative measure acted upon being December 4, 1916, by the terms of the latter ordinance such initiative petition must be filed with the recorder not later than 30 days before that date. In order to comply with this requirement the last date upon which such petition could have been filed was November 3, 1916. In other words, after the filing of such petition, 30 full days must elapse before the election. The filing of the petition having been completed on November 4th, excluding that day only, 29 days would elapse before December 4, 1916.

Section 531, L. O. L., provides in part as follows:

“The time within which an act is to be done, as provided in this Code, shall be computed by excluding the first day and including the last, unless the last day fall upon Sunday, Christmas, or other nonjudicial day, in which case the last day shall also be excluded.”

In *Rynearson v. Union County*, 54 Or. 181 (102 Pac. 785), in applying Section 531, L. O. L., to the statute requiring a satisfactory proof “that notice has been given by advertisement, posted * * thirty days previous to the presentation of said petition to the county court,” where the notice was posted upon September 3d, and the first day of the term of the County Court then next ensuing was October 3, 1906, it was held that such notices were posted only 29 days prior to the session of the court: See, also, *United States Nat. Bk. v. Shefler*, 77 Or. 579, 581 (143 Pac. 51, 152 Pac. 234).

It is unnecessary, therefore, to consider the question as to whether the ordinance is in force, as in any event the initiative petition was not filed according to the

allegations of the alternative writ 30 days before the city election, in accordance with Ordinance No. 1464.

The demurrer to the writ will therefore be sustained.

DEMURRER SUSTAINED.

MR. JUSTICE MCBRIDE, MR. JUSTICE BENSON and
MR. JUSTICE HARRIS CONCUR.

Argued July 14, affirmed September 12, rehearing denied December 5,
1916.

HANCOCK LAND CO. v. PORTLAND.

(159 Pac. 969.)

Evidence—Admissions of Counsel.

1. On appeal in a suit against a city to cancel an assessment of realty and to enjoin its sale, where defendant's counsel admitted that the proof of the posting of notices of the proposed improvement originally filed did not meet the requirements of Portland City Charter, Section 376, and that, if the proceedings were based only on such proof, there was a lack of jurisdiction, the court would assume that the proof submitted was inadequate.

[As to silence of attorney when opposing attorney during trial states matter of fact admitted by adverse party as admission of such matters, see note in *Ann. Cas.* 1913E, 945.]

Evidence—Presumptions—Rebuttal.

2. Section 868, subdivision 2, L. O. L., provides that the jury are not bound to find against a presumption or other evidence satisfying their minds, and Portland City Charter, Section 404, provides that in any suit assessment proceedings shall be presumed to be regular until the contrary is shown. In a suit to cancel an assessment of real property and to enjoin its sale where the defendant relied on the presumption of regularity, the affidavit of the posting of the notices of the proposed improvement, received in evidence, was defective. *Held*, that a presumption cannot contradict facts or overcome facts proved; that the affidavit overcame the presumption that official duty had been regularly performed, and imposed upon the defendant the duty of introducing in evidence another affidavit regular in form, showing the posting of the notices as required, or to substantiate the loss of such proof in the manner prescribed by law.

FROM MULTNOMAH: LAWRENCE T. HARRIS, Judge.

Department No. 1. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by the Hancock Land Company, a corporation, against the City of Portland, a municipal corporation, to cancel an assessment of real property and to enjoin the sale of the premises alleged to have been benefited by a street improvement. The complaint states generally that, pursuant to authority conferred by the common council of Portland, Page Street in that city was improved from the east line of Albina Avenue to the west line of Ross Street, extended southerly, and the cost thereof \$3,568.38, was undertaken to be imposed upon the real property bordering upon that part of Page Street and asserted to have been benefited by the improvement; that a part of the land thus included within the prescribed district was, at the time the improvement was made, owned by the heirs of J. B. Montgomery, deceased, and their estate in the premises was assessed to the extent of \$1,581.16, which sum was entered in the docket of city liens; and that thereafter the plaintiff purchased from such heirs the real property last referred to, "subject to said assessment." The initiatory pleading particularly sets forth many alleged failures to comply with the municipal law in respect to the making of the improvement, only one of which defects will be adverted to:

"That the charter of the City of Portland also provides: 'Sec. 376. The resolution of the council declaring its purpose to improve the street shall be kept of record in the office of the auditor and shall be published for ten consecutive publications in the city official newspaper. The city engineer within five days from the first publication of said resolution shall cause to be conspicuously posted at each end of the line of the contemplated improvement a notice headed "Notice of Street Work" in letters of not less than one inch in

length, and said notice shall contain in legible characters a copy of the resolution of the council and the date of its adoption, and the engineer shall file with the auditor an affidavit of the posting of said notices, stating therein the date when, and places where the same have been posted.' That the defendant disregarded said provisions of the charter and neglected and failed to post at each end, or to post at all, in a conspicuous place, the notice provided in said section of the city charter, and the city council failed to obtain jurisdiction of said property, and its proceedings in relation to said improvement were void."

The answer admits, *inter alia*, the excerpt quoted from the charter, denies that there was any failure to comply with the requirements of such municipal law in making the improvement, and sets forth facts as further defenses. The averments of new matter in the answer were denied in the reply, and based on these issues the cause was tried, resulting in a decree granting the relief prayed for in the complaint, until a reassessment of the real property within the district can be made, and the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Henry A. Davie*, Deputy City Attorney, and *Mr. Walter P. La Roche*, City Attorney, with an oral argument by *Mr. Davie*.

For respondent there was a brief over the name of *Messrs. Boothe & Richardson*, with an oral argument by *Mr. J. F. Boothe*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. At the trial the plaintiff's counsel offered in evidence an affidavit of posting the notices of the pro-

posed improvement, whereupon the court, referring to such written sworn statement, remarked:

"As I understand, counsel for the defense admits this proof of posting originally filed does not meet the requirements of the law?"

The defendant's counsel replied:

"Yes; we will admit that.

"The Court: And that if the proceedings were based only on this original proof, that there is disclosed a lack of jurisdiction?"

"Defendant's Counsel: Yes; if they were based on that alone, it would disclose a lack of jurisdiction."

Neither the original affidavit of the posting of the notices nor a copy thereof has been brought to this court. It will be assumed, from the admission of the defendant's counsel, that the proof submitted was inadequate. It is admitted by defendant's counsel that the posting of notices of the street improvement was a jurisdictional prerequisite, but contended that proof thereof by filing the city engineer's affidavit was not essential to an exercise of the power of the common council to hear and determine that matter. They maintain that, notwithstanding the defective affidavit of such posting which was made, filed and received in evidence, the trial court should have disregarded such proof and invoked the presumption that official duty had been regularly performed, but in failing to do so and in granting the relief prayed for in the complaint errors were committed.

2. Section 404 of the municipal law reads:

"In any action, suit or proceeding in any court concerning any assessment of property or levy of taxes authorized by this charter, or the collection of such tax or proceeding consequent thereon, such assessment, levy, consequent proceeding, and all proceedings con-

nected therewith, shall be presumed to be regular and to have been duly done or taken until the contrary is shown."

Rule 119 of Lawson's Law of Presumptive Evidence is as follows:

"A presumption cannot contradict facts or overcome facts proved."

A text-writer in discussing this subject observes:

"There is some confusion in the cases upon the question whether a presumption is evidence and has probative force. Since the function of a presumption logically considered is merely to impose the burden of going forward with the evidence upon the party against whom it operates, when contrary evidence is adduced the presumption disappears, although the facts upon which it rested still remain as evidence in the case": 9 Ency. Ev. 885.

In the absence of any other proof, a presumption is usually indulged as substantive evidence to substantiate or refute a material fact. The jury, however, are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds: Section 868, subd. 2, L. O. L. In the case at bar the trial court, for want of any other evidence on the subject, would undoubtedly have been authorized to indulge the presumption now invoked, and, having done so, to deduce therefrom the conclusion that the notices of the street improvement had been regularly posted, and that the engineer had filed with the auditor an affidavit as required by Section 376 of the charter, stating in the written sworn declaration the date when and the places where the same had been posted, but that the affidavit had been mislaid or lost. In the present

instance the affidavit was produced and received in evidence, thereby overcoming the presumption that official duty had been regularly performed and imposing upon the defendant the duty of introducing in evidence another affidavit, regular in form, showing the posting of the notices as required, or to substantiate the loss of such proof in the manner prescribed by law. The presumption can be relied upon "until the contrary is shown": Section 404, City Charter. The contrary having been established as thus stated, no foundation remained upon which to predicate the presumption. Thus in *Hughes v. City of Portland*, 53 Or. 370, 384 (100 Pac. 942, 948), Mr. Justice BEAN, discussing this subject, says:

"In a suit to enjoin the enforcement of a reassessment, it will, when the record of the council is silent, be presumed that the objections of the property owners were considered by the council and found without merit, when it subsequently passes the reassessment ordinance, as though such objections were not in the way."

To the same effect see, also, *Trummer v. Konrad*, 32 Or. 54, 56 (51 Pac. 447); *Duniway v. Portland*, 47 Or. 103, 117 (81 Pac. 945); *Goodnough Merc. Co. v. Gallo-way*, 48 Or. 239, 243 (84 Pac. 1049).

The decree is therefore affirmed.

AFFIRMED.

OPINION CORRECTED AND REHEARING DENIED.

MR. JUSTICE BENSON, MR. JUSTICE McBRIDE and MR. JUSTICE BEAN concur.

Decided December 5, 1916.

ON PETITION FOR REHEARING.

(161 Pac. 250.)

Former opinion corrected and petition for rehearing denied.

Mr. Henry A. Davie, Deputy City Attorney, and *Mr. Walter P. La Roche*, City Attorney, for the petition.

Messrs. Boothe & Richardson, contra.

Department No. 1. Opinion by MR. CHIEF JUSTICE MOORE.

In the former opinion, in referring to evidence received at the trial, it is said:

“Neither the original affidavit of the posting of the notices nor a copy thereof has been brought to this court.”

The transcript relating to this matter reads:

“The plaintiff offers the original proof of posting, and we ask to have it marked ‘Plaintiff’s Exhibit C,’ with the privilege of withdrawing the same and substituting a copy.”

Attached to the transcript is a paper having in type-writing at the top thereof the words: “Plaintiff’s Exhibit ‘C.’” There is no certificate appended to indicate that it is a copy of the evidence so received. In the excerpt quoted from the opinion, the word “certified” should have been employed to limit the word “copy” as there used. No doubt is entertained in this instance that what purports to be a copy of the affidavit referred to is an exact exemplification of the original. By the language first hereinbefore quoted it was designed to show that, if such practice was approved, it

might be possible in some other case for designing parties to substitute spurious exhibits which might escape the attention of adverse parties, thereby imposing upon this court.

With the insertion of the qualifying word mentioned, and correcting the former opinion in this particular, the petition for a rehearing is denied. **AFFIRMED.**

FORMER OPINION CORRECTED AND REHEARING DENIED.

Submitted on brief October 24, affirmed December 5, 1916.

DOERSTLER v. FIRST NAT. BANK.*

(161 Pac. 386.)

Banks and Banking—National Bank Examiner—Official of Bank.

1. A national bank examiner is not an agent or officer of a bank which he examines.

Estoppel—Persons to Whom Estoppel is Available.

2. A statement to a national bank examiner by a depositor in reply to a question by the examiner as to whether loans by the president of the bank were authorized furnishes no basis for an estoppel in favor of the bank and against the depositor; the examiner not being an officer or agent of the bank.

Banks and Banking—Liability of Bank for Acts of Officers.

3. While a depositor in a national bank is presumed to know that the bank is without authority to lend his funds for his benefit as an individual, the president of a national bank, having made representations to an uneducated depositor that his deposit could be lent so as to be called within 30 days yet bring a fair rate of interest, cannot, the depositor understanding that the president was acting for the bank, make loans of the depositor's funds without rendering the bank liable.

[As to liability of banks for frauds of officers, see note in 39 Am. Rep. 760.]

Trial—Instructions—Form of Instructions.

4. An instruction submitting an issue to the jury need not follow the testimony of the witnesses if it accurately presents the situation.

Trial—Instructions—Issues Presented.

5. Where a depositor in a national bank sued for deposits which had been loaned by the president, contending that the president was

*Authorities discussing the question of liability of bank for acts of officers in excess of their powers are gathered in notes in 55 L. R. A. 751; 39 L. R. A. (N. S.) 174.

acting for the bank, while the bank contended that the president was acting individually, and that the depositor was estopped to assert liability against it, an instruction on the powers of national banks is not necessary; for the fact that the depositor attempted to authorize the bank to perform an *ultra vires* act in lending his money did not authorize the president to appropriate the funds and excuse the bank from liability for his misappropriation.

Trial—Instructions—Assumption of Facts.

6. In an action against a national bank to recover deposits, the bank contended that the depositor consented to the act of the president in loaning his deposits, and that he was estopped to assert the liability of the bank. The court charged that an estoppel is that by which a person by his own act which he has committed precludes him from asserting the truth. Other portions of the charge clearly showed that the court did not assume that plaintiff's testimony at trial was true, and that the statement on which the estoppel was based was untrue. *Held*, that the charge was not erroneous as assuming that plaintiff's testimony at trial was true.

Estoppel—Equitable Estoppel—Definition.

7. An "estoppel" may be defined as where a man is concluded and forbidden to speak against his own act or deed, though it is to say the truth.

Appeal and Error—Review—Instructions.

8. Where the instructions correctly present the law, a judgment will not be reversed for mere technical inaccuracies.

From Douglas: **JAMES W. HAMILTON**, Judge.

In Banc. Statement by **MR. JUSTICE McBRIDE**.

This is an action by **M. S. Doerstler** against the First National Bank of Roseburg, a corporation, to recover the balance due on alleged deposits made in defendant bank.

The complaint alleged, in substance, that for many years prior to April 27, 1911, plaintiff had been a depositor of defendant bank, and that upon that date he had on deposit \$5,365.90; that since said date defendant has paid him upon said deposit the sum of \$6.90, and no more, leaving a balance due him of \$5,359, for which he prays judgment, together with interest.

The answer denied that plaintiff had on deposit the sum stated, or that there was any sum whatever due him from defendant. For a further answer defendant alleged that it was a duly authorized national bank;

that on June 17, 1911, it sold all its assets, except certain overdue notes and accounts, and its goodwill to the Douglas National Bank, which assumed the deposit accounts of defendant; that at said date plaintiff had on deposit with defendant the sum of \$6.90, and no more, which the Douglas National Bank afterward paid him. There was also a plea of account stated. Another defense set forth was that plaintiff requested T. R. Sheridan, the president of defendant, to loan his money, and authorized him to withdraw it for that purpose, and that thereupon and long prior to the sale of the defendant bank to the Douglas National Bank Sheridan withdrew from the bank and loaned for plaintiff the following sums: \$469 loaned to B. C. Agee, \$1,700, to A. M. Kelsey, and \$1,760, to T. R. Sheridan; that said sums, aggregating \$3929, were all the funds of plaintiff deposited in the defendant bank, except \$6.90 paid to plaintiff as aforesaid; that Sheridan, acting solely as the agent of plaintiff, took the notes of the parties to whom the loans were made, inserted them in an envelope, marking it with the name of the plaintiff, and placed them in the vaults of defendant for safekeeping at the request of and for the sole use and benefit of plaintiff; that these notes were never mingled with the securities of the bank, but were kept separate and apart in that portion of the vaults devoted entirely to the safekeeping of papers belonging to customers, being treated by defendant and its employees as private property, and in no sense as belonging to defendant. Then follows a plea of estoppel based upon the answer of plaintiff to a circular letter sent to him by R. W. Goodhart, United States bank examiner, which letter and answer *mutatis mutandis* are identical with the letter and answer referred to in

Carlton v. First Nat. Bank, 80 Or. 539 (157 Pac. 809), and are therefore not quoted in full.

The plaintiff filed a reply putting in issue all the new matter in the answer except that he admitted signing the answer to the letter sent him by the bank examiner. Concerning that matter his reply is as follows:

"That at all times mentioned in the complaint and answer in this case T. R. Sheridan was and is the duly elected, qualified and acting president of the First National Bank, and its chief executive officer, having the actual management and control of said bank; [that the business transacted between plaintiff and defendant was almost exclusively done through said Sheridan as the president, agent, and representative of said bank; that while plaintiff was a depositor of said bank, and prior to April 27, 1911, the said Sheridan, as president of defendant bank, informed plaintiff that the bank could lend some of the funds of plaintiff then on deposit in said bank, so as to earn for plaintiff 6 per cent per annum, and that at any time plaintiff desired to use said funds said bank could call them in upon 30 days' notice; that thereafter the said bank rendered to plaintiff statements of account showing that certain funds of plaintiff had been loaned by said bank, but said bank never informed plaintiff as to the names of borrowers of said funds, or the nature of any security taken, or the length of time any such loan was to run or of any other particulars regarding the same, and plaintiff believed from said statements and from the representations theretofore made to plaintiff through said Sheridan that said bank had loaned plaintiff's funds, and that plaintiff could at any time obtain such funds from said bank by giving 30 days' notice, and that plaintiff would receive interest upon said funds; that said bank never delivered to plaintiff any promissory note or other security or evidence relating to any such alleged loans, and plaintiff was thereby led to believe, and did believe, that all securities taken for any such alleged loans were taken in the name of said bank, and plaintiff, because of said representations of

said Sheridan, did not expect said bank to turn any such security or securities over to plaintiff, but plaintiff was at all times led by said bank to believe and did believe that plaintiff was simply to look to said bank for his money; that because of the foregoing facts, when plaintiff received from said bank statements showing that some of plaintiff's funds had been loaned, plaintiff made no objection, but relied upon the said representations;] that when the defendant bank ceased business in June, 1911, it was stated by the officers of the defendant bank and the officers of the Douglas National Bank of Roseburg, Oregon, that the said banks had consolidated, and for that reason plaintiff believed that the consolidated bank would still be responsible for his funds, and did not learn until long afterward that the defendant bank had really gone out of business, and that the pretended consolidation was not a consolidation in fact, but that the said Douglas National Bank had simply taken over certain securities formerly held by the defendant bank, and had become responsible for certain specific deposits of the defendant bank; [that the plaintiff never learned until long after the closing of the defendant bank that it was claimed by the said bank or by said Sheridan that the said Sheridan had personally taken plaintiff's funds in the manner set forth in defendant's answer herein; that plaintiff never ratified or acquiesced in said alleged taking of his funds; that plaintiff never in any way authorized the said Sheridan to withdraw any funds whatever from plaintiff's account in said bank;] that while plaintiff's account with defendant bank was active, and while said bank was going into liquidation, plaintiff resided in Curry County, remote from any railroad communication, said bank being located at Roseburg, [and plaintiff was not informed as to the condition of said bank or as to the fact that it was going into liquidation, but at all times believed said bank to be a strong, wealthy institution, and its officers and managers thoroughly honorable and responsible;] that plaintiff is informed and believes, and therefore alleges, that B. C. Agee and A. M. Kelsey, who are mentioned in the defendant's answer herein as

persons to whom the said Sheridan loaned some of the funds of plaintiff, were at the time of said alleged loans business associates of the said Sheridan, and if the said Sheridan paid into the hands of said Agee or said Kelsey any of the funds of plaintiff, it was done largely for the personal benefit of said Sheridan and done without the knowledge and consent of plaintiff; that plaintiff never directly or indirectly authorized the said Sheridan as an individual to lend any of the plaintiff's funds or withdraw any part thereof from defendant bank for any purpose, [and never authorized said bank to so dispose of plaintiff's funds that he would no longer be able to look to said bank as responsible for the repayment of same, but the only arrangement as to the lending of plaintiff's money which plaintiff ever made with defendant bank was that defendant bank, in consideration of defendant bank's putting a part of plaintiff's money to work to earn interest, that plaintiff would not call for the same except upon 30 days' notice to defendant bank;] that in the month of June or July, while plaintiff was on a visit to Hagerstown, Indiana, plaintiff received the letter set out on page 5 of said answer, of R. W. Goodhart, national bank examiner; that neither at the time of the receipt of said letter nor until long afterward did plaintiff receive any notice or knowledge that the defendant bank was liquidating its affairs or proposed to go out of business, [and when said letter was received by plaintiff, plaintiff assumed that the same was a mere banking formality, did not carefully read the same, and did not understand that the object thereof was to cause plaintiff to release the defendant bank from responsibility for said alleged loans;] that the statement appended to said letter which was signed by plaintiff was prepared by said Goodhart, ready for plaintiff's signature, [and plaintiff signed the same without understanding the real meaning thereof; that plaintiff supposed that by signing said letter he was simply ratifying the making of loans from plaintiff's funds by defendant bank under the arrangement hereinbefore mentioned, and that plaintiff would still have the right

at any time upon 30 days' notice to demand said funds from said bank; that the plaintiff received his early education in the German language, his knowledge of the English language is limited; that he is unacquainted with banking methods and business forms generally, and when he signed said statement did not understand that the language of said statement had the meaning which it is now alleged is conveyed thereby; that plaintiff never intended to release defendant bank from liability for any of the funds which he had deposited with said bank, but only intended to ratify any loans which said bank had made to the extent that plaintiff would not seek to withdraw any of said funds without 30 days' notice; that plaintiff is informed and believes, and therefore alleges, that the said Goodhart at the time of writing said letter to plaintiff knew that said bank's affairs were not in sound condition, and knew that the said T. R. Sheridan, its president, was in failing circumstances, and had been withdrawing from the accounts of various depositors of said bank large sums of money for the personal use or benefit of said Sheridan, under pretense of making loans therefrom, and the said Goodhart at all times concealed said knowledge from this plaintiff, and plaintiff long after the receipt of said letter believed said bank to be a sound and responsible financial institution and its officers reliable and trustworthy; that the said Goodhart thereby deceived plaintiff by his silence, and caused plaintiff to sign said statement without carefully investigating the meaning thereof; that had plaintiff been advised as to what the facts were, that said bank was going into liquidation, and that said Sheridan's conduct as president of said bank had been irregular or corrupt, plaintiff would not have signed said statement without taking legal advice so as to know the true meaning thereof; that said statement did not express plaintiff's true intent or meaning, and the signing thereof was due entirely to misapprehension and deception;] that in truth and in fact the alleged loans mentioned in said answer were really misappropriations by said Sheridan of the funds of said bank, and said Sheridan fraudu-

lently concealed the real character thereof, [as said Goodhart well knew when he addressed said letter to plaintiff, and as the directors and other officers of said bank knew or could have known had they examined or scrutinized the affairs of said bank and the conduct of said Sheridan as president, as it was at all times their duty to do].”

Defendant moved to strike out all those portions of the reply above quoted which are included in brackets, but the motion was overruled. Upon the trial defendant excepted to certain instructions given by the court and to the refusal of the court to give instructions requested by defendant. These matters will be noted in the opinion. There was a trial and verdict for plaintiff, and defendant appeals.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief over the name of *Mr. Oliver P. Coshow*.

For respondent there was a brief over the name of *Mr. B. L. Eddy*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. Many of the questions raised on this appeal have been settled in previous cases arising between the defendant and other depositors. The motion to strike out portions of plaintiff's reply to defendant's plea of estoppel was properly overruled. As held in *Carlton v. First Nat. Bank*, 80 Or. 539 (157 Pac. 809), and *Verrell v. First Nat. Bank*, 80 Or. 550 (157 Pac. 813), the bank examiner was not the agent of the bank, and no statement to him would estop the plaintiff from

asserting the facts in an action between him and the bank.

2. The plaintiff, however, assuming the facts to be well pleaded, replied by showing that he was not in possession of all the facts when he signed the certificate requested by the bank examiner, and, while the matter pleaded is somewhat prolix, we think it is relevant. The circumstances were not fully and fairly stated in the letter written by the bank examiner, and the certificate at the bottom which plaintiff was requested to sign was evidently framed so as to entrap the plaintiff into an affirmative answer. He was requested to sign if the statement appended was correct. It would have been but fair if the examiner had fully stated the exact condition of affairs as between the bank and Sheridan, and then asked the plaintiff to write a reply instead of making a partial statement of the circumstances and confining plaintiff to a "yes or nothing" answer. The other questions raised upon the testimony are discussed in the cases above cited, and need not here be considered.

3. Taking the plaintiff's testimony as a whole, it tends to show that he was dealing with Sheridan as a representative of the bank, and supposed that it was the bank which was to loan his money for him. Granted that he was presumed to know as a matter of law what neither laymen nor lawyers usually know as a matter of fact, namely, that the bank could not loan his money for him, it does not follow that one of the officers of the bank had a right to use his official position and the bank's apparent responsibility as a false token to get plaintiff's money. No doubt, the method by which the bank would draw the money when a loan was made was rather hazy in his mind, as his letters introduced in evidence show that he is an un-

educated, ignorant rancher. He knew that the bank had his money and was responsible, and the president of the bank in its place of business told him that he could loan it for him at 6 per cent. To him, as to most ignorant people, the president was the bank. As he expresses it in his crude way, "I supposed the bank would be security for the money"; that is, he supposed that he was dealing with the bank, and that it was responsible and able to replace his money within 30 days if he called for it. Had he presented a certificate of deposit for payment and Sheridan had said to him, "I will pay the certificate next week," neither he nor anyone else would have understood that Sheridan intended to pay it out of his own pocket, and when Sheridan said, "I will loan your money and pay you 6 per cent interest," he naturally supposed that Sheridan was speaking for the bank, and no doubt Sheridan intended that he should so believe. Assuming that there was technical error in the instructions, we would still be disposed to affirm the judgment under the provisions of Article VII, Section 3, of our Constitution as amended; but there is no reversible error if we take the instructions as a whole.

4. The first objection to the instructions is that the court, in stating what the plaintiff claimed, used the following language: "And that Mr. Sheridan told him [plaintiff] that he would lend the money for him at a premium." Whereas the plaintiff had actually employed this language: "So he told me he would loan it out for me and give me 6 per cent interest." The court was not attempting to quote the testimony *verbatim*, but in a general way to call the attention of the jury to the issue between the parties, and the use of the word "premium" instead of "6 per cent interest" could not mislead the jury.

5. It is next objected that the court did not give an instruction correctly defining the limitations upon the powers of national banks. There was no occasion for such an instruction under the pleadings or evidence. The plaintiff's contention was that he had deposited his money in the bank, and the bank had refused to repay him. The defendant's contention was that plaintiff had authorized Sheridan personally to draw it out and loan it, and that he had drawn it out pursuant to such authority. The plaintiff takes issue here, and claims that he did not authorize Sheridan personally to loan the money, but that such authority was given the bank, and that Sheridan, the principal officer of the bank, drew it out and misappropriated it. If plaintiff made Sheridan his agent to loan the money and withdraw it from the bank for that purpose, and he did so, the bank is not liable, and the court, in effect, so instructed. If he attempted to make the bank his agent, and its president drew out the money and misappropriated it, no matter what the bank's limitations as to lending money for others may be, it is liable for the money so unlawfully withdrawn. It does not follow that, because plaintiff attempted to give the bank authority to do an act in relation to his deposit that was *ultra vires*, an officer of the bank could withdraw an amount of money equal to plaintiff's deposit, charge it up against plaintiff, and convert it to his own use. As remarked by Judge DEADY in *United States v. Randall*, 1 Deady, 524, Fed. Cas. No. 16,118, where a postmaster was convicted of stealing gold-dust from the United States mails, and the contention was made that gold-dust was not mailable matter. "Because gold-dust is not mailable, it does not follow that it is not stealable." So here it does not follow that because the bank had no right to act as a broker for plaintiff, and

his alleged authorization of it to do so was void, the president of the bank could steal an amount and cover the theft by charging it against plaintiff's balance, and thereby relieve his bank of liability. Whether the bank under the circumstances could lawfully have loaned the money for plaintiff is a matter of no importance. It says that it did not loan it, and plaintiff says it did loan it, so the whole question comes down to this: Did plaintiff authorize Sheridan personally as his agent to draw out and loan the amount of his deposit? This the court left to the jury, and it has found that he was not so authorized.

6, 7. Exception is taken to some language used by the court in instructing the jury upon the law of estoppel. There are some expressions in this part of the charge which taken alone might seem to have a tendency to mislead, but when considered with the context this cannot be said to be their effect. The whole of the court's charge on that subject is as follows:

"The defendant then also, as I have already told you, has pleaded that which is denominated as estoppel. And you will remember the fact alleged with regard to that particular defense is this: That upon the inspector, Goodhart, sending to the plaintiff a letter making inquiry as to the matter of these particular charges against his account, he answered as has already been read to you with regard to it. And it is alleged in the answer that for this reason the plaintiff is estopped; that is, by his own answer. What is meant by that is that he is prevented from asserting his right or his claim to this particular money, because he made the answer which he did, and it becomes necessary for me, gentlemen, to explain the law applicable to that particular feature of the case, and it is also quite an important matter of the law for you to consider in applying it to the facts in this case. I cannot better illustrate the proposition of estoppel, gentlemen, than by this: We will suppose that one of you jurors

owned a horse, and another person, a third party, came by and made a bargain with yet someone else for the horse, in your presence, the horse being yours, and you stood by and allowed the purchaser to pay his money for your horse and take it, supposing that it belonged to the seller, whereas, in truth and in fact, it belonged to you; the law says that under such circumstances as that, although the horse belonged to you in fact, you could not now assert it, because it would be fraud and imposition upon the person who was led to pay his money for the horse when you by acting at the time could have prevented it. And the law says that an estoppel is that in which a person by his own act which he has committed precludes himself from asserting the truth; and what they intend to say by this answer is that the plaintiff in this case, being asked at the time as to the facts in the matter, that he did not assert the truth, that is, contrary to what he now says, and for that reason he is estopped to state the truth, that is, to recover the money. Plaintiff says it belonged to him, he did not authorize Sheridan to make this loan to himself or these parties, and says he was dealing with the bank. They say that he should have said that at that time. Now, as to that, gentlemen, I state to you that if you find under the law as I shall give the same to you in this case that the plaintiff has deposited the money as claimed in this bank, and that there is still due him an amount of money, if you find that under the law as I shall give it to you, applying it in this case, then he is not estopped in this case to assert his rights and to recover whatever you may find to be due him. This letter, which you have seen and which has been admitted—the plaintiff admits that he made this answer—is allowed to go before you, and you have the right to consider it. It is in the nature of a declaration made by him, you giving it such credit as you may deem it to be worth, and, after applying it, taking the answer he has made and all of the circumstances in the case, you find that the evidence is with the plaintiff, that the facts are as he claims them to be in regard to that contract or the authority which was given to the bank, then, notwithstanding the fact that he may

have written the letter and which he admits that he did, he still would be entitled to recover what you find due him in this action. The reason for that is that the bank inspector did not represent the bank. And it is not in evidence that the bank in any way changed its position by reason of any answer that the plaintiff made. And so I say to you that so far as being estopped, conclusively estopped, to assert the claim which the plaintiff is making in this action, he is not estopped by the fact that he has written that letter; but if you should find from the evidence, and you have a right to consider the letter for that purpose, that he authorized Sheridan to make the loan or loans, and that the dealing was as claimed in defendant's answer as set forth, if you find that fact by preponderance of the evidence, then the plaintiff could not recover in the case. And I instruct you in connection with that fact that you have a right to consider the transaction, where it took place, the manner of dealing, under the circumstances, dealing with the bank, and then make up your mind from all of the evidence in the case as to whether or not the plaintiff authorized Sheridan to take this money from the bank, or whether he gave authority to the bank to lend his money as he stated. And I instruct you that, if he did authorize the bank to lend his money, that would not authorize Sheridan or any officer of the bank to appropriate his money."

In defendant's view of the case the vice of this instruction, the sting in the tail of the scorpion, so to speak, is embodied in these words:

"And the law says that an estoppel is that in which a person by his own act which he has committed precludes him from asserting the truth; and what they intend to say by this answer is that the plaintiff in this case, being asked at the time as to the facts in the matter, that he did not assert the truth, that is, contrary to what he now says, and for that reason he is estopped to state the truth, that is, to recover the money. Plaintiff says it belonged to him, he did not authorize Sheridan to make this loan to himself or these parties, and

says he was dealing with the bank. They say that he should have said that at that time."

If we substitute the word "fact" for "truth," the instruction would substantially conform to Mr. Bouverier's definition of an estoppel, which he declares to be primarily:

"The preclusion of a person from asserting a fact by previous conduct inconsistent therewith on his own part, or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question."

While this definition may cover many instances, it is too narrow to cover all. A more comprehensive one is given in *Demarest v. Hopper*, 22 N. J. Law, 599, quoted with many others of like character in 3 Words and Phrases under this title:

"An estoppel is where a man is concluded and forbidden by law to speak against his own act or deed; yea, even though it is to say the truth."

Standing alone, that part of the definition given by the court in the instant case would be misleading, but, taking the whole instruction together, it is apparent that the court did not assume the truth of the statement made by plaintiff upon the witness-stand in explanation of his contradictory statement made to the bank examiner. For instance, the court said in defining estoppel:

"What is meant by that is that he [plaintiff] is prevented from asserting his right or his claim to this particular money because he made the answer which he did."

—referring to plaintiff's answer to the Goodhart letter, and again:

"Plaintiff says it belonged to him; he did not authorize Sheridan to make the loan to himself or these

parties. They say he should have said that at that time."

Further, it will be seen from that part of the charge first quoted that the court, while holding, as this court held in previous cases, that the letter was not technically an estoppel, instructed the jury in effect that they could consider it for the purpose of determining the question as to whether the plaintiff had, in fact, authorized Sheridan to withdraw the money, and that, if they found such to be the case, the plaintiff could not recover. The effect of the whole charge upon this subject was to submit to the jury the question of the truthfulness of his statements made in the letter to the bank examiner. We do not think that, considered as a whole, the instruction contains reversible error or that the jury could have been misled by it.

8. Other objections are urged to expressions used by the court in its instructions, but, in our opinion, they go merely to their technical accuracy. If in the hurry of a *nisi prius* trial every word and sentence were weighed by this court with an eye singled to discover technical defects, there would be scarcely a law case brought here which would not be reversed, but such is not the duty of an appellate court. Here the question is: Were the issues fairly and fully given to the jury, was the law correctly stated to them, and if it transpires that the charge is in any respect inaccurate, was such inaccuracy of such a character that it might have changed the result of the verdict? We do not find such a state of affairs in this case. As we view it, there was but one question for the jury to decide, and that was whether the plaintiff authorized Sheridan as an individual and as his agent to draw against his deposit in the bank and to loan the money so withdrawn. If he did not, he should recover, and

the verdict was right; and this issue, as well as the rules by which the evidence should be weighed, were, in our opinion, fairly stated without substantial error.

The judgment is affirmed.

AFFIRMED.

Argued September 19, reversed October 17, rehearing denied December 5, 1916.

CORMACK v. CORMACK.

(160 Pac. 380.)

Municipal Corporations—Presumption as to Assessment for Street Improvements—Extending Time for Work.

1. The charter of Portland, declaring that an assessment for street improvement, and everything connected therewith, shall be presumed regular till the contrary is shown, and that the executive board shall fix the time in which an improvement shall be completed and may extend it if the circumstances warrant, an assessment cannot be held void, merely because the work was completed four days after the time limited, there being no evidence that the executive board, which accepted the improvement, did not seasonably extend the time, which it could do on its motion, though it appears that the city council attempted to extend the time after completion of the work.

[As to tax certificate or deed as *prima facie* evidence of legality of assessment, see note in Ann. Cas. 1914A, 892.]

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is a suit by Florence A. Cormack against A. J. Cormack, Thomas C. Ordemann and the City of Portland, substituted in this court for Thomas C. Ordemann, to determine an adverse claim to real property. The allegation of the complaint concerning the realty is as follows:

“That plaintiff now is and for a long time past has been the owner of the following described real property, situated in Multnomah County, State of Oregon:

Lot 14 in Block 40, Rosemere, an Addition to the City of Portland."

This averment is denied by the answer, but the defendant Ordemann admits that he has an adverse claim to the premises. Affirmatively he alleges matter through which he became the owner and holder of a certificate issued by the city treasurer in pursuance of a sale to satisfy a delinquent assessment for a street improvement.

The reply denies the transfer to the defendant Ordemann of the certificate and controverts the regularity of the action of the treasurer, but otherwise admits the allegations of the answer. The reply further gives a history of the street improvement, in which it is said that:

"The contract, among other things, provided that the said work should be fully completed within six months from the time the said contract was entered into; that the said work was not completed within six months of the time the contract was entered into and was not completed until the fourth day of November, 1913; and that no application was made by the said Oregon Independent Paving Company for an extension of time within which to complete the said work."

From the admissions in the pleadings and the stipulation of facts we derive the following *résumé* of the situation: Late in 1912, the council of the City of Portland regularly passed an ordinance providing for the improvement of certain streets, designating the same as district improvement No. 251; plaintiff's property being within the assessment district and liable to taxation to pay for the betterment. On April 30, 1913, the city contracted with the Oregon Independent Paving Company for making the improvement, and thereafter, in pursuance thereof, the company completed

the work, which was subsequently approved and accepted by the council. The contract, "among other things, provided that the said work should be fully completed within six months from the time the said contract was entered into." In fact, it was not finished until November 4, 1913, and the contractor made no application for an extension of time; but on the date last mentioned the city council granted the contractor an extension to that day to complete the work. Thereafter the city authorities took regular proceedings to enforce the assessment as by the charter provided, resulting in the sale already mentioned, and it is the outstanding certificate of sale which is the basis of the adverse claim to plaintiff's property. It is agreed that the certificate was finally transferred to the city. The only defect in the whole procedure of which complaint is made is that the contractor was four days late in completing its undertaking. Declaring the certificate null and void, the Circuit Court entered a decree in favor of plaintiff according to her prayer, and the defendants appeal.

REVERSED.

For appellants there was a brief over the names of *Mr. Lyman E. Latourette* and *Mr. Frederick De Neffe*, with an oral argument by *Mr. Latourette*.

For respondent there was a brief and an oral argument by *Mr. Fred L. Everson*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. Certain excerpts from the charter of the City of Portland are here set down:

"Sec. 404. In any action, suit or proceeding in any court concerning any assessment of property or levy of taxes authorized by this charter, or the collection

of such tax or proceeding consequent thereon, such assessment, levy, consequent proceeding, and all proceedings connected therewith shall be presumed to be regular and to have been duly done or taken until the contrary is shown."

After the council passes an ordinance for making any improvement, the control of the proceeding according to the charter passes to a body called the executive board to advertise for proposals for making the improvement and to make contracts for the faithful completion of the work. In Section 379, we find the following:

"It shall be the duty of the executive board to fix the time in which every such improvement shall be completed and it may extend such time should the circumstances warrant. The said board shall have power and authority to make all written contracts, * * to provide for the proper inspection and supervision of all work done under the provisions of this article, and to do any other act to secure the faithful carrying out of all contracts, and the making of improvements in strict compliance with the ordinances and specifications thereof."

Section 380 provides, in substance, that, upon consummation of any improvement to his satisfaction, the city engineer shall certify his approval thereof to the auditor. The latter officer in turn publishes a notice of the completion, stating when the acceptance of the improvement will be considered by the executive board, at which time or prior thereto any property owner may file objections to the same. If upon consideration of the grounds of opposition it appears to the board that the job has not been finished in accordance with the specifications and contract, "the board shall require the same to be so completed before accepting it." After the executive board accepts an improvement, thence-

forward the proceedings are ministerial, consisting of the entry by the auditor of the assessment upon the docket of the city liens, his certification to the treasurer after a certain time of delinquent assessments, and the sale by that officer of the property for the satisfaction of the lien.

From the record it appears that the plaintiff made no protest whatever against the proceeding ripening into the assessment until she commenced this suit. She did not embrace her opportunity to appear before the executive board as she might to object to the acceptance of the work. Under the requirements of Section 404, already quoted, the burden is upon her to point out a fatal defect in the procedure. The presumption of its regularity attends the action of the municipal authorities until the contrary is shown. In this respect the charter is a restatement of the general rule that, where jurisdiction is shown to have attended the inauguration of a proceeding, it is safe from collateral attack except for defects which make it absolutely void on its face. If, therefore, the procedure under consideration appears to be consistent with what rightfully might have been done, it is immune from the attack aimed by this suit.

In *Duniway v. Portland*, 47 Or. 103, 112 (81 Pac. 945, 948), Mr. Chief Justice WOLVERTON, treating of objections to a city improvement, said:

“But, however this may be, the council, as we shall see presently, presumably passed upon the objections, and the plaintiffs are now precluded from again raising the issue in this collateral way, except it be shown that the council has itself proceeded fraudulently”—citing authorities.

In *Hendry v. City of Salem*, 64 Or. 152 (129 Pac. 531), Mr. Chief Justice McBRIDE, said:

“The proceedings for making this improvement seem to have been entirely regular, and the council had jurisdiction to order the improvement and to enter into the contract. This being the case, mere irregularities in the method of carrying on the work will not be sufficient to release the property owners from the obligation of paying their assessments. * * The council accepted the improvement, and, in the absence of fraud, their decision that it complied with the contract is conclusive”—citing authorities.

No reference is made by the plaintiff to any act of the executive board. The prerogative of that body to fix the time for the completion of the work was invaded by the council when it put into the ordinance the provision on that point. In that respect the ordinance is not controlling in the issue here. For aught that appears, as it might properly have done, the executive board may have extended the time for the completion of the undertaking. It matters not that the contractor made no application for such an indulgence. In its capacity as general director of the undertaking the executive board could have extended the time on its own motion so as to bind the city and ultimately the taxpayer. It was the contract, and not the ordinance, that controlled the parties on that feature. Like all other contracts, the parties to the same by their lawfully authorized agents could waive or modify any of its requirements or make a new contract within the scope of the authority of the representative. Until the contrary is made to appear by the complaining party, under the precedents and charter cited, we must presume in aid of the proceeding that all this was done.

The complaint does not disclose any injury to the rights of the plaintiff. It would be inequitable to grant her exemption from payment for an improvement, the only objection to which is that it was not completed

until four days after the time provided therefor seems to have elapsed, when we are able to presume that the executive board extended the time, and that, too, while the term of the contract was yet unexpired.

The decree of the Circuit Court is reversed, and one here entered dismissing the plaintiff's suit.

REVERSED. SUIT DISMISSED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and MR. JUSTICE BENSON CONCUR.

Argued October 10, reversed December 5, 1916.

WOODBURN v. PUBLIC SERVICE COMMISSION.*

(161 Pac. 391.)

Constitutional Law—Police Power.

1. When an owner devotes his property to a use in which the public has an interest, he must submit to be regulated and controlled by the public for the common good.

Public Service Commissions—Regulation of Rates.

2. The regulation of rates for the purpose of promoting the public health, comfort, safety and welfare is an exercise of the police power of the sovereign.

[As to validity of regulation by public service commission fixing minimum rates to be charged by public service corporation, see note in *Ann. Cas.* 1916A, 933.]

Constitutional Law—Impairment of Contracts—Telephone Rates.

3. If a telephone company's franchise from a city, limiting rates to be charged, is deemed a contract, the mere fact that it was made prior to the enactment of the Public Utility Act (*Laws* 1911, p. 483), and before the state attempted to regulate such rates, does not debar the state from increasing the rates as fixed in the franchise, because when the state exercises its police power, it does not work any impairment of obligation of the contract; the possibility of the exercise of such power being an implied term of the contract.

Constitutional Law—Rate-fixing Power—Delegation to Municipality.

4. Since the right to regulate rates is an inherent element of sovereignty, such right can be delegated to a municipality only by clear

*On the power of legislature to fix tolls, rates or prices of public service corporations, see comprehensive note in 33 *L. E. A.* 177.

On right to reduce rates of public service corporation fixed by franchise, see note in *L. E. A.* 1915C, 261, 287.

and express terms, and all doubts must be resolved against the municipality.

Municipal Corporations—Legislative Control—Home Rule Charter.

5. Article XI, Section 2, of the Constitution, providing that the legal voters of every city and town are granted power to enact and amend their municipal charter subject to the Constitution and criminal laws of the State of Oregon, and forbidding the legislative assembly to amend or repeal any charter for any municipality, etc., does not extend the authority of such municipalities over subjects not properly municipal and germane to the purposes for which municipal corporations are formed.

Municipal Corporations—Regulation of Rates.

6. The right to regulate rates is a matter of general concern, and does not pertain solely to municipal affairs.

Telegraphs and Telephones—Regulation by Municipality—Regulation by State.

7. Where a municipality under its home rule charter, adopted under Article XI, Section 2, of the Constitution, granted a telephone franchise limiting rates to be charged, and later the Public Utility Act (Laws 1911, p. 483), was enacted, the Public Service Commission had authority thereunder to authorize the company to charge higher rates.

Telegraphs and Telephones—Regulation—Public Service Commission.

8. The failure of the Public Service Commission to file a statement of valuation mentioned in Section 10 of the Public Utility Act (Laws 1911, p. 483), does not affect the validity of an order, allowing a telephone company to charge higher rates than those stated in its franchise, since the right to make the order does not depend upon filing the statement of valuation, and, in any event, under direct provision of Section 75 of the act, technical omissions are immaterial.

From Marion: WILLIAM GALLOWAY, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

The City of Woodburn was incorporated by an act of the legislative assembly in 1889; but, on June 30, 1909, the legal electors of the city exercised the right of home rule conferred by Article XI, Section 2, of the state Constitution, and amended their charter by enacting that the common council shall have authority:

“To grant franchises in, through and upon the streets of the city for public uses and public benefits”; and “to regulate and control or prohibit the placing of poles for electric lights or other purposes, and the suspension of electric and other wires along on cross-streets of said city, and to require any or all already

placed or suspended, either in limited districts or throughout the entire city, to be removed, or to be placed in such manner as it may designate beneath the surface of the streets or sidewalks."

In October, 1910, the common council granted by ordinance, and the United Telephone Company accepted, a franchise which permitted the company and its successors to construct and maintain telephone poles and wires along the streets of Woodburn. One section of the franchise fixed the monthly maximum rates to be charged for telephones. A telephone plant was installed by the United Telephone Company, but afterward the franchise and plant owned by it were transferred to the Western Telephone Company, a corporation, and the present owner. The company has extended its lines beyond the boundaries of Woodburn, and it renders service to patrons who reside without, as well as to customers who live within, the city limits. In July, 1915, the Western Telephone Company applied to the Public Service Commission for permission to increase the telephone rates. After giving due notice to both the company and the city, a public hearing was held, and the Commission ordered that the company be permitted to increase its rates on condition that the applicant avoid duplication by effecting a consolidation of its system with a competing telephone plant, which was then occupying the same territory. The two telephone plants were consolidated, and then on December 1, 1915, the Public Service Commission directed that the Western Telephone Company charge a specified schedule of rates. The charges specified in this schedule were greater than the rates fixed in the franchise, and for that reason the city then commenced a suit to vacate the order made by the Public Service Commission, and to enjoin the Western Telephone Company from charging any greater rates than

those named in the franchise which had been granted by the City of Woodburn. After a trial the Circuit Court vacated the order of the commission, and enjoined the company from exacting any charges in excess of the amounts specified in the franchise. Both the Public Service Commission and the Western Telephone Company appealed. **REVERSED.**

For appellant, Western Telephone Company, there was a brief over the name of *Messrs. John H. & Charles L. McNary*, with an oral argument by *Mr. Charles L. McNary*.

For appellant, the Public Service Commission, there was a brief over the names of *Mr. John O. Bailey*, Assistant Attorney General, and *Mr. George M. Brown*, Attorney General, with an oral argument by *Mr. Bailey*.

For respondent there was a brief with oral arguments by *Mr. George G. Bingham* and *Mr. Blaine McCord*.

MR. JUSTICE HARRIS delivered the opinion of the court.

The decree appealed from is predicated upon the argument that the Public Service Commission was without power to permit the telephone company to charge urban customers more than the rates named in the franchise, which the city had granted prior to the creation of the Public Service Commission. Before proceeding with the discussion, attention will be called to some of the provisions of the legislation which was designed to clothe the commission with authority to fix the rates to be charged for telephone service. An act to define public utilities and to provide for rate regulation was passed by the legislative assembly in

1911 (Laws 1911, p. 483); but upon the filing of a petition in the office of the Secretary of State the measure was referred to the legal voters of the state at the regular general election on November 5, 1912, when they approved the act by a majority vote, and afterward on November 29, 1912, the Governor proclaimed that the measure was the law of the state: Laws 1913, p. 9. The Public Utility Act is similar to the legislation which has been adopted in most of the states, and confers upon the commission the power to regulate telegraph, telephone, street railroad, heat, light, water, and power plants so that a safe and adequate service may be rendered to the public at reasonable and sufficient rates. The term "public utility" embraces every owner operating a telephone plant for the public "and whether said plant or equipment or part thereof is wholly within any town or city, or not": Section 1. Power to regulate public utilities is conferred upon a commission which was, at that time, called the Railroad Commission of Oregon (Section 6), but is now known as the Public Service Commission of Oregon: Laws 1915, p. 347. Every public utility is required to furnish adequate and safe service, and unjust or unreasonable charges are prohibited. The commission may hold a hearing (Section 42), on the complaint of patrons that the rates being charged are unreasonable or unjustly discriminatory (Section 41), or on the complaint of any public utility "as to any matter affecting its own product or service" (Section 46), or an investigation may be made on the motion of the commission (Section 45); and "if upon such investigation, any rates * * shall be found to be unjust, unreasonable, insufficient or unjustly discriminatory * * the commission shall have power to fix and order substituted therefor such rate or rates, * * as shall be just and

reasonable * * " (Section 43); and, furthermore, the commission "shall determine and by order fix reasonable rate or rates, * * in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory * * (Section 51). The power of a municipality to regulate utilities is provided for by Section 61 which declares that:

"Every municipality shall have power—(1) To determine by contract, ordinance or otherwise the quality and character of each kind of product or service to be furnished or rendered by any public utility furnishing any product or service within said municipality and all other terms and conditions not inconsistent with the act upon which such public utility may be permitted to occupy the streets, highways or other public property within such municipality and such contract, ordinance or other determination of such municipality shall be in force and *prima facie* reasonable. Upon complaint made by such public utility or by any qualified complainant as provided in Section 41, the commission shall set a hearing as provided in Section 42 and if it shall find such contract, ordinance or other determination to be unreasonable, such contract, ordinance or other determination shall be void. Provided, however, that no ordinance or other municipal regulation shall be reviewed by the commission under the provisions of this section which was prior to such review enacted by the initiative or which was prior to such review referred to and approved by the people of said municipality or while a referendum thereon is pending."

In brief, the facts present a situation where the legal voters of the city amended their municipal charter and conferred upon the common council authority to grant franchises in the streets for public benefits; the council exercised this chartered power, and granted a franchise to a telephone company, the rates to be charged to be fixed by the terms of the franchise; subsequently

the Public Utility Act was passed by the legislative assembly, and then referred to all the voters of the state, who approved the measure at a general election; and, finally, upon the application of the telephone company, the Public Service Commission, acting under the authority of the Public Utility Act, specified a schedule of rates to be charged by the telephone company, and the city is now complaining because those rates exceed the charges fixed in the franchise.

The ultimate question for decision is whether the Public Service Commission was lawfully empowered to specify rates different from those fixed by the terms of the franchise. Throughout the discussion it must be borne in mind that the state, acting through the Public Service Commission, is a party to this suit, and consequently judicial precedents, arising out of controversies between none but the immediate parties to a franchise, are not controlling here. Moreover, the present juncture does not call for a decision of the relative rights of the grantor and grantee of a franchise as between themselves. Furthermore, the very purpose of this litigation is to determine whether the state has in fact empowered Woodburn to fix a schedule of rates which the state could not afterward change, and hence we must also distinguish all those judicial utterances which followed a finding that the state had actually conferred upon a city the power unalterably to fix the rates to be charged by the grantee of a franchise.

1, 2. Power to govern men and things is inherent in government, and when an owner devotes his property to a use in which the public has an interest, he must submit to be regulated and controlled by the public for the common good: *Munn v. Illinois*, 94 U. S. 113 (24 L. Ed. 77); *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389 (58 L. Ed. 1011, L. R. A. 1915C, 1189, 34 Sup.

Ct. Rep. 612). The right to regulate the rates to be charged by a public utility inheres in the power to govern. The regulation of rates for the purpose of promoting the health, comfort, safety and welfare of society is an exercise of the police power, and is therefore an attribute of sovereignty: *Hudson Water Co. v. McCarter*, 209 U. S. 349 (52 L. Ed. 828, 14 Ann. Cas. 560, 28 Sup. Ct. Rep. 529); *Yeatman v. Towers*, 126 Md. 513 (95 Atl. 158); *Benwood v. Public Service Com.*, 75 W. Va. 127 (83 S. E. 295, L. R. A. 1915C, 261); *State ex rel. Webster v. Superior Court*, 67 Wash. 37 (120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78); *Idaho Power & Light Co. v. Blomquist*, 26 Idaho, 222 (141 Pac. 1083, Ann. Cas. 1916E, 282). Being an inherent element of sovereignty, the whole sum of this police power may, for the purposes of this suit, be regarded as having been primarily and originally lodged in the state; and, without attempting to decide whether the state can relinquish any part of the police power to cities so as to be deprived of the right to resume the relinquished power, we shall now seek to ascertain whether the police power, to the extent of the right to regulate rates, passed from the sovereignty when the franchise was accepted by the telephone company. The inquiry involves two general questions: (1) The effect of the franchise when considered by itself; and (2) the result effected by the franchise when considered with relation to the city and state.

3. If the franchise is deemed to be a contract between the city and telephone company, then the mere fact that it was made prior to the enactment of the public utility statute and before the state attempted to regulate the rates, does not debar the state from increasing the rates fixed in the contract between the parties, for the reason that the law wrote into it a

stipulation by the city that the state could, at any time, exercise its police power and change the rates; and therefore, when the state does exercise its police power, it does not work an impairment of any obligation of the contract. The immediate parties to the franchise must contract with reference to the right of the government to exercise its inherent authority. The governed cannot, by contract, forestall the resuscitation of a dormant police power by the government; and therefore, unless the state actually divested itself of the right to exercise its police power, the agreement by which the city and company specified the rates was made subject to the right of the state to change them: *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467 (57 L. Ed. 297, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. Rep. 265); *Union Dry Goods Co. v. Georgia Pub. Service Corp.*, 142 Ga. 841 (83 S. E. 946); *Yeatman v. Towers*, 126 Md. 513 (95 Atl. 158); *Minneapolis St., P. & S. S. M. Ry. Co. v. Menasha W. W. Co.*, 159 Wis. 130 (150 N. W. 411, L. R. A. 1915F, 732); *Portland R. L. & P. Co. v. Railroad Com. of Oregon*, 229 U. S. 397 (57 L. Ed. 1248, 33 Sup. Ct. Rep. 820); *Hudson Water Co. v. McCarter*, 209 U. S. 349 (52 L. Ed. 828, 14 Ann. Cas. 560, 28 Sup. Ct. Rep. 529); *Benwood v. Public Service Commission*, 75 W. Va. 127 (83 S. E. 295, L. R. A. 1915C, 261); *State ex rel. Webster v. Superior Court*, 67 Wash. 37 (120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78).

4. We now come to a consideration of the result brought about by the franchise when viewed in connection with the authority of the city and state. The city argues that Article XI, Section 2, of the state Constitution granted to Woodburn, and at the same time took from the legislative assembly, the right to legislate concerning the regulation of rates. When exam-

ining the contention urged by the municipality, we must not lose sight of the fact that the right to regulate rates by changing them from time to time as the welfare of the public may require is essentially a police power; and, since the right to regulate rates is an inherent element of sovereignty, when seeking to ascertain whether this part of the police power has been conferred upon the city, either with or without limitation, we are constantly governed by the rule that the delegation of the sovereign right to regulate rates must be clear and express, and all doubts must be resolved against the city: *Home Telephone Co. v. Los Angeles*, 211 U. S. 265 (53 L. Ed. 176, 29 Sup. Ct. Rep. 50); *Milwaukee Elec. Ry. v. Wisconsin R. R. Com.*, 238 U. S. 174 (59 L. Ed. 1254, 35 Sup. Ct. Rep. 820); *Benwood v. Public Service Commission*, 75 W. Va. 127, (83 S. E. 295, L. R. A. 1915C, 261); *State ex rel. Webster v. Superior Court*, 67 Wash. 37 (120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287); *City of Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wis. 13 (129 N. W. 925, 140 Am. St. Rep. 1052). Quoting from *Charleston Consol. Ry. & Lighting Co. v. City Council*, 92 S. C. 127 (75 S. E. 390):

“The state’s power to regulate by compulsion the charges of public service corporations is one of such vast and increasing importance to the public that the courts will not attribute to the state the intention to part with it or to delegate it unless the intention is clearly and unmistakably expressed.”

Unless the right to exercise the police power of regulating rates is referable to an unmistakable grant, the prices specified in the franchise are not exempted from interference by the legislative assembly. The city is relying upon Article XI, Section 2, of the state Con-

stitution as amended in 1906, and, which, so far as it is now material, is here quoted:

“Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon. * * ”

Much of the printed brief submitted for the Public Service Commission is devoted to an argument that the legislative assembly is not prohibited from enacting any general law, though it has the effect of amending city charters. The instant controversy, however, does not make it necessary to determine whether the legislative assembly is prohibited from passing general, as well as special, laws which affect city charters; and hence, waiving the question and without attempting to foreclose debate, it will be assumed that this investigation is governed by the prevailing opinion in *Kalich v. Knapp*, 73 Or. 558 (142 Pac. 594, 145 Pac. 22, Ann. Cas. 1916E, 1051), where a majority of the court ruled that the legislative assembly is prohibited by Article XI, Section 2, of the state Constitution from amending city charters by special or by general laws.

5. While the Constitution grants to a city the right to enact and amend its charter and simultaneously prohibits the legislative assembly from enacting, amending or repealing any charter for any city, nevertheless, neither the grant nor the prohibition includes any subjects except those “that are purely local and municipal in character” (*Kalich v. Knapp*, 73 Or. 558 (142 Pac. 594, 145 Pac. 22, Ann. Cas. 1916E, 1051), or, as is stated in *Branch v. Albee*, 71 Or. 188, 205 (142

Pac. 598), the authority of the cities is not extended "over subjects that are not properly municipal and germane to the purposes for which municipal corporations are formed. We use the word 'municipal' as signifying what belongs to a city."

In *Coleman v. La Grande*, 73 Or. 521, 525 (144 Pac. 468, 470), this court ruled that:

"By granting and reserving to the people of municipalities the power to enact and amend their charters and adopt local or special laws, the state has not surrendered her sovereignty to the municipalities. Within their boundaries cities are clothed with power to regulate matters purely local. However, a city is not constituted as a sovereignty as regards all matters of legislation, but is still to a certain extent a mere agency of the state of which it is a part. Beyond such municipal boundaries and in matters of general concern not pertaining solely to local municipal affairs, cities are amenable to the general laws of the state, which do not infringe upon the right of cities to local self-government. This is so whether such laws are enacted by the legislature or by the people of the state at large."

6. The right to regulate rates is a matter of general concern, and does not pertain solely to local municipal affairs: *Portland Ry., Light & Power Co. v. City of Portland* (D. C.), 210 Fed. 667. It is true that the regulation of the rates for telephones in Woodburn may not immediately affect the pocketbooks of all the people of the whole state any more than does the prosecution of a person in a Justice Court for assault and battery, when taken alone and by itself, directly affect all the people of the whole state, and yet the state is just as much interested in promoting the comfort and general welfare of all the people as in preserving peace for all the people. In these modern times, when the activities of public utilities are not always confined to

a single city, the people are especially concerned in the retention of the right to adjust rates to changing conditions, so that no person may be discriminated against and all may receive adequate service at reasonable rates, and at the same time affording sufficient returns to the public utility. The state guards its right to regulate rates so vigilantly that specific authority is necessary to compel a surrender of this element of sovereignty and in the language of the Supreme Court of the United States:

“The general powers of a municipality or of any other political subdivision of the state are not sufficient”: *Home Telephone Co. v. Los Angeles*, 211 U. S. 265 (53 L. Ed. 176, 29 Sup. Ct. Rep. 50); *Milwaukee Elec. Ry. v. Wisconsin R. R. Com.*, 238 U. S. 174 (59 L. Ed. 1254, 35 Sup. Ct. Rep. 820).

The power to regulate rates does not appertain to the government of a city; it is not municipal in character; nor is it even an incident to a grant of authority to enact or amend a charter for a city or town: *State ex rel. Webster v. Superior Court*, 67 Wash. 37 (120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287). The language appearing in *State ex rel. Garner v. Missouri & K. Telephone Co.*, 189 Mo. 83 (88 S. W. 41), is peculiarly applicable here, and for that reason we quote extensively from the reported opinion:

“Until the adoption of our Constitution in 1875 all cities in the state derived their charter powers from the General Assembly, and therefore whatever was contained in a city charter had the full force of a legislative enactment. But under that Constitution cities of certain descriptions were authorized to frame their own charters. A charter, framed under that clause of the Constitution within the limits therein contemplated has a force and effect equal to one granted by an act of the legislature. But it is not every power that may be essayed to be conferred on the city by

such a charter that is of the same force and effect as if it were conferred by an act of the General Assembly, because the Constitution does not confer on the city the right * * to assume all the powers that the state may exercise within the city limits, but only powers incident to its municipality, yet the legislature may, if it should see fit, confer on the city powers not necessary or incident to the city government. There are governmental powers, the just exercise of which is essential to the happiness and well-being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city, but until so delegated they are reserved. The words in the Constitution, 'may frame a charter for its own government,' mean may frame a charter for the government of itself as a city, including all that is necessary or incident to the government of the municipality, but not all the power that the state has for the protection of the rights and regulation of the duties of the inhabitants in the city, as between themselves. * * The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the state that grants the franchise or that suffers it to be exercised within its borders, and that power may be, with wisdom and propriety, conferred on a municipal corporation, but it is not a power appertaining to the government of the city, and does not follow as an incident to a grant of power to frame a charter for a city government''

7. The right of the state to regulate rates by compulsion is a police power, and must not be confused with the right of a city to exercise its contractual power to agree with a public service company upon the terms of a franchise. The exercise of a power to fix rates by agreement does not include or embrace any portion of the power to fix rates by compulsion. When Woodburn granted the franchise to the telephone company,

the city exercised its municipal right to contract, and it may be assumed that the franchise was valid and binding upon both parties until such time as the state chose to speak; but the city entered into the contract subject to the reserved right of the state to employ its police power and compel a change of rates, and when the state did speak, the municipal power gave way to the sovereign power of the state: *Benwood v. Public Service Commission*, 75 W. Va. 127 (83 S. E. 295, L. R. A. 1915C, 261); *State ex rel. Webster v. Superior Court*, 67 Wash. 37 (120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287); *City of Monroe v. Detroit M. & T. S. L. Ry.*, 187 Mich. 364 (153 N. W. 669); *City of Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wis. 13 (129 N. W. 925, 140 Am. St. Rep. 1056); *Charleston Consol. Ry. & Lighting Co. v. City Council*, 92 S. C. 127 (27 S. E. 390); *Duluth St. Ry. Co. v. Railroad Commission*, 161 Wis. 245 (152 N. W. 887); *California-Oregon Power Co. v. City of Grants Pass* (D. C.), 203 Fed. 173. Other instructive cases are: *Borough of North Wildwood v. Board of Pub. U. Commrs.*, 88 N. J. Law, 81 (95 Atl. 749); *Worcester v. Street Ry. Co.*, 196 U. S. 539 (49 L. Ed. 591, 25 Sup. Ct. Rep. 327); *City of Dawson v. Dawson Telephone Co.*, 137 Ga. 62 (72 S. E. 508); *City of Kenosha v. Kenosha Home Telephone Co.*, 149 Wis. 338 (135 N. W. 848); *Borough v. Ohio Valley Water Co.*, 245 Pa. 114 (91 Atl. 236); *Phillipsburg v. Board of Pub. U. Commrs.*, 85 N. J. Law, 141 (88 Atl. 1096).

The power to fix rates by compulsion as distinguished from the power to fix rates by agreement is not granted to cities or towns, nor is the right of the legislative assembly to legislate upon that subject curbed, by Article XI, Section 2, of the state Constitution because in its essence it is neither a municipal power nor an incident to a pure municipal power, and

therefore, even under the rule announced by the majority opinion in *Kalich v. Knapp*, 73 Or. 558 (142 Pac. 594, 145 Pac. 22, Ann. Cas. 1916E, 1051), the legislative assembly was not prohibited from making the Public Utility Act applicable to urban as well as extraurban territory. The defendants have vigorously contended that approval of the Public Utility Act by the vote of the people made the measure valid even though it be conceded that the act would be invalid without the approval of the electorate. It will not be necessary, however, to decide whether a measure passed by the legislative assembly is validated when referred to the people and approved by them, when in the absence of such reference and approval the measure would be invalid because of the prohibition contained in Article XI, Section 2; and we therefore leave this question open for future consideration.

The city has limited the inquiry to the question of whether the commission possessed the necessary power to change rates, and hence we are not now concerned with the amount or reasonableness of the rates. Our conclusion is that the Public Service Commission, as the representative of the state, had lawful authority to change the telephone rates.

8. Any failure of the commission to file the statement of valuation mentioned in Section 10 does not affect the validity of the order involved in the appeal. The right to make the order did not depend upon filing the statement of valuation with the city recorder; and, moreover, Section 75 of the Public Utility Act provides that no order of the commission shall be declared illegal "for any omission of a technical nature in respect thereto."

The decree of the Circuit Court is reversed and the suit is dismissed.

REVERSED. SUIT DISMISSED.

Argued October 11, affirmed December 5, 1916.

SORENSEN v. KRIBS.*

(161 Pac. 405.)

Principal and Agent—Agent's Authority—Implied Warranty—Damages.

1. When an agent represents that he is empowered to make a particular contract on behalf of his principal, but in fact has no such authority, the party to whom the representation is made, and who relies thereon and complies with the terms of the supposed agreement, can maintain an action *ex contractu* against the agent, on the implied warranty, to recover the damages sustained.

[As to authority of agent to warrant, see note in Ann. Cas. 1913D, 473.]

Assignments—Right of Action.

2. A husband's assignment to his wife of his claim against an owner for a commission for effecting a sale of land would not suffice as a transfer of the husband's cause of action against a broker, who misrepresented himself to be empowered by the owner to employ plaintiff's husband; and unless she obtained an assignment of the claim against the agent before action was brought, she could not recover against him.

Assignments—Right of Action—Question for Jury—Time of Assignment.

3. In an action by a wife as the assignee of her husband to recover damages from defendant for his misrepresentation of his authority from an owner to employ the husband as a broker, *held*, that it was for the jury to determine whether the assignment of the claim was made before the action was commenced.

Principal and Agent—Authority of Agent—Action for Damages—Construction of Pleading.

4. Where the complaint alleged that defendant represented his authority to obligate an owner of land to pay a broker's commission to plaintiff's assignor on a sale acceptable to the owner, and that the defendant had no such authority, an answer denying the allegations generally, with an unqualified allegation that defendant employed plaintiff's assignor to sell the land on commission, and not stating that such engagement was made on behalf of the owner, construed most strongly against the defendant, implied that the employment was made for defendant's benefit, and that he had no authority to make such a contract on behalf of the owner.

Principal and Agent—Agent's Authority—Presumption and Burden of Proof.

5. On such implication that defendant employed plaintiff's assignor on his own account to sell the land upon commission, for the payment

*For authorities passing on the question of personal liability to other contracting party of one who, without authority, assumes to contract as agent for another, see note in 34 L. R. A. (N. S.) 518.

of which the owner was not bound, Section 799, subdivision 33, L. O. L., raised the presumption that such want of authority continued after an option obtained by plaintiff was declared forfeited, and to overcome such presumption the burden was on defendant to show that authority was thereafter conferred upon him by the owner to engage a broker and to agree to pay him a commission for procuring a purchaser acceptable to the owner.

Evidence—Burden of Proof—Party Having Peculiar Knowledge.

6. When a fact is peculiarly within the knowledge of a party, he must, if necessary, furnish the evidence thereof.

Principal and Agent—Liability of Agent—Unauthorized Act—Action for Damages—Question for Jury.

7. In an action for damages for defendant's misrepresentation of his authority to employ plaintiff's assignor as a broker on behalf of the owner of land, *held*, that the denial of defendant's motion for a directed verdict was not error.

Trial—Requested Instructions—Given Instructions.

8. In such action, there was no error in refusing to give defendant's instruction omitting the matter of a renewed or subsequent employment, where its substance was embraced in the instruction given.

Appeal and Error—Instructions—Necessity of Requests.

9. Under Section 139, L. O. L., providing that the court shall state to the jury all matters of law thought necessary for their information, but shall not present the facts of the case, and shall tell the jury that they are the exclusive judges of questions of fact, and Section 868, declaring the jury the judges of the evidence, unless it is declared to be conclusive, and that they are to be instructed as to precautionary matters, no failure of the court in submitting a party's theory of the case can be considered on appeal, except upon the denial of a requested instruction directly stating the law applicable to the case.

Trial—Instructions—Requests—Applicability.

10. No error is committed in denying a requested instruction, which does not correctly announce the law applicable to the case, though such request may call the court's attention to a particular matter not covered by the general charge.

Appeal and Error—Instructions—Review.

11. In an action for damages for defendant's misrepresentation of his authority to employ plaintiff's assignor as a broker on behalf of the owner, where defendant acquiesced in the court's instruction that plaintiff was entitled to the entire commission and interest, or nothing, the defendant had no reason to complain of the court's refusal to instruct that plaintiff could not recover if the agreement was for defendant's payment to plaintiff's assignor of part of the commission to be received from the owner, or that, if the contract between plaintiff's assignor and defendant was for the division of the commission between themselves and another, the verdict should be for the defendant.

Appeal and Error—Review—Broad Equities of Case.

12. In a law action, where, on appeal, only alleged errors duly assigned can be considered the argument upon the "broad equities" of the case has no place.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department No. 2. Statement by MR. CHIEF JUSTICE MOORE.

This is an action by Mrs. N. V. Sorenson, as the assignee of her husband, George Sorenson, a real estate broker, against F. A. Kribs, to recover damages. The material facts are that C. A. Smith, of Minneapolis, Minnesota, was the equitable owner of 7,480 acres of timber land in Douglas County, Oregon, and employed the defendant, a real estate broker, of Portland, in this state, to negotiate a sale of the real property. In order to procure a purchaser, Kribs appointed Sorenson, who on September 28, 1906, produced J. O. Storey, to whom the defendant gave an oral option to buy the land at \$187,000, on account of which \$50,000 was required to be paid within 60 days. Sorenson assured Storey he could have all the time desired in which to make the partial payment, and for that reason he neglected to pay the stipulated sum within the time limited, whereupon the option was declared at an end. Thereafter Storey commenced an action against Kribs to recover the damages which he had sustained, consisting of more than \$2,000 expended in examining the timber growing on the land and \$63,000, which extra sum he could have realized upon a resale of the premises. While that action was pending, Storey, in the name of the Storey-Bracher Lumber Company and C. P. Bratnaber, entered into a written contract with Smith to purchase the land for \$300,000; the vendees stipulating to save the vendor harmless from any claim for a commission for negotiating a sale of the land, except

that of Kribs, whereupon that action was dismissed. In an action by this plaintiff as the assignee of her husband against Smith to recover a commission on account of the sale thus consummated, she recovered \$15,000; but the judgment was reversed on the ground that Kribs had no authority to bind Smith to pay a commission: *Sorenson v. Smith*, 65 Or. 78 (129 Pac. 757, 131 Pac. 1022, Ann. Cas. 1915A, 1127, 51 L. R. A. (N. S.) 612). The facts here involved, and referred to in the opinion in that case, are set forth as matters of inducement in the complaint herein, which charges, in effect: That about July —, 1907, the defendant, assuming to act for Smith and representing that he had authority to do so, agreed with Sorenson to obligate Smith to pay a commission of 5 per cent of the purchase price of the land, continued to employ Sorenson to procure a purchaser of the real property, and instructed the broker further to negotiate with Storey in order to induce him to pay a greater sum than he had originally offered for the land, and Kribs agreed to pay Sorenson 5 per cent of the purchase price if he could find a buyer who was able, ready and willing to pay a sum which was acceptable to Smith. That, pursuant to that employment, Sorenson at the defendant's request continued to negotiate with Storey until October 31, 1909, when he was induced to purchase the land for \$300,000, which sum was satisfactory to Smith, whereupon Storey, in the name of the Storey-Bracher Lumber Company, and Bratnober, with whom Storey was associated, made a contract with Smith to buy the land for the sum last named, which amount has been paid. That by reason of the premises Sorenson became entitled to a commission of \$15,000, the payment of which was demanded of Smith, who refused to comply therewith on the ground that Kribs had no author-

ity to bind him to pay any commission. That in consequence thereof Sorenson was damaged in the sum of \$15,000 and interest thereon at 6 per cent per annum from October 31, 1909. That the defendant had no authority to obligate Smith to pay any sum as commission, and Sorenson's claim therefor was assigned, prior to the commencement of this action, to the plaintiff, who is the owner and holder thereof.

The answer unqualifiedly denies each averment of the complaint generally. For an affirmative defense, the facts relating to the first option and the cancellation thereof are set forth, and it is substantially alleged that when Storey's original agreement was terminated, the defendant informed Sorenson thereof and notified him that his employment as a broker or otherwise was ended; that whatever services may have thereafter been rendered by Sorenson, in connection with the sale of the land, were not performed for the defendant acting for himself, or for any other person under his employment. It is further averred that, subsequent to the termination of the original option, Storey and Bratnober negotiated for the purchase of the land directly with Smith, who refused to sell to them unless Sorenson would waive any claim that he might have for a commission, whereupon Storey, acting for himself, entered into an agreement with Sorenson by the terms of which it was stipulated that, if Bratnober would furnish all the money necessary to purchase the land and appoint Sorenson and Storey brokers to negotiate a resale of the premises on or before July 1, 1910, they should be paid a commission for their services; that Bratnober complied with these conditions, and Sorenson in consideration thereof waived all claims for a prior commission.

The reply put in issue the allegations of new matter in the answer, and the cause having been tried, the jury found for the plaintiff as demanded in the complaint, viz., \$19,925, and, judgment having been rendered on the verdict, the defendant appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Messrs. Giltner, Sewall & Corliss*, with oral arguments by *Mr. R. R. Giltner, Mr. Guy C. H. Corliss* and *Mr. Edwin H. Flick*.

For respondent there was a brief over the names of *Mr. Martin L. Pipes* and *Mr. George A. Pipes*, with an oral argument by *Mr. Martin L. Pipes*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. Preliminary to a consideration of the errors assigned, it should be said that this action is founded upon the legal principle, established in this state, that when an agent represents he is empowered to make a particular contract on behalf of his principal and no such authority has been bestowed, the party to whom the statements were made by relying thereon and complying with the terms of the supposed agreement so concluded, can maintain an action *ex contractu* against the agent, on the implied warranty, to recover the damages thus sustained: *Cochran v. Baker*, 34 Or. 555 (52 Pac. 520, 56 Pac. 641); *Anderson v. Adams*, 43 Or. 621 (74 Pac. 215). See, also, *Kennedy v. Stonehouse*, 13 N. D. 232 (100 N. W. 258, 3 Ann. Cas. 217), and *Haupt v. Vint*, 68 W. Va. 657 (70 S. E. 702, 34 L. R. A. (N. S.) 519).

When this cause was submitted to the jury, the defendant's counsel moved for a directed verdict in favor of their client, on the grounds that the evidence received

disclosed the claim sued on was not assigned prior to the commencement of this action; that the plaintiff introduced no testimony tending to show any want of authority on the part of the defendant to bind Smith to pay a commission; and that this action is founded upon a contract alleged to have been made in July, 1907, when no evidence thereof was offered. Considering these matters in the order stated, attention is called to the case of *Sorenson v. Smith*, 65 Or. 78 (129 Pac. 757, 131 Pac. 1022, Ann. Cas. 1915A, 1127, 51 L. R. A. (N. S.) 612), where the broker's claim now asserted against the defendant for a commission for negotiating the same sale is alleged to have been assigned to this plaintiff. At the trial herein George Sorenson testified, on direct examination, that prior to the commencement of this action he assigned his claim for a commission to his wife, who then was the owner and holder thereof. On cross-examination, however, in answer to the inquiry, "Who did you tell her you had a commission from?" he replied, "From C. A. Smith. Q. Did you ever make any other assignment to her? A. No." On redirect examination, the attention of the witness was called to the testimony which he had thus given on cross-examination, and he was asked whether or not, before the commencement of this action, he had assigned his claim for a commission to his wife. He answered:

"I misunderstood the question. I meant, I made the assignment of this \$15,000. * *

"Q. That is the claim in this case?

"A. Yes."

On recross-examination he was asked:

"When was it you made the assignment?"

He responded:

"Just before this suit was brought.

"Q. When was that?

"A. About a year and a half ago.

"Q. What did you say to your wife?

"A. I said I am assigning this claim. You will have to bring a new suit.

"Q. What is this claim?

"A. This \$15,000.

"Q. What is this claim you assigned to your wife?

"A. My claim against Kribs.

"Q. What for?

"A. Commission of \$15,000."

2, 3. It needs no argument to show that the broker's claim for a commission against Smith, which was assigned to this plaintiff before she began her action against him, would not suffice as a transfer of a cause of action against Kribs, and unless she obtained an assignment of the claim against the latter before this action was instituted, she was not entitled to a recovery herein. From Sorenson's contradictory statements, relating to the assignment, the court could not, as a matter of law, say which sworn declaration was true. It was therefore the province of the jury, from a careful comparison and consideration of such testimony, to determine whether or not the assignment of the claim against Kribs was made before this action was commenced: *Pacific Biscuit Co. v. Dugger*, 42 Or. 513 (70 Pac. 523). No error was committed in respect to the assignment.

4. It will be remembered the complaint charged that the defendant represented he was authorized to obligate Smith to pay a broker's commission in case a sale of the land could be made for a price acceptable to the owner, and that the defendant did not have such authority. The averments of the complaint are denied generally without any qualification in the answer which

alleged that prior to September 26, 1906, the defendant employed Sorenson to sell the land on commission. The answer does not state that such engagement was made for or on behalf of Smith. Construing that pleading most strongly against the defendant, it must therefore be taken for granted that the employment was made for his benefit. It is also fairly to be inferred from the defendant's pleading that he had no authority to make such a contract on behalf of his principal.

5, 6. It being implied from the answer that the defendant employed Sorenson on his own account to sell the land upon commission for the payment of which Smith was not obligated, the law raises the presumption that such want of authority continued after the oral option was declared forfeited: Section 799, subd. 33, L. O. L. In order to overcome this presumption the burden of proof was imposed on the defendant, notwithstanding his general denial of a want of authority, to show to the satisfaction of the jury that after the option was terminated, authority was conferred upon him by his principal to engage the services of a broker and to agree to pay him a commission for procuring a purchaser of the land who would pay a price which was acceptable to the owner: *Peabody v. Oregon R. & N. Co.*, 21 Or. 121, 134 (26 Pac. 1053, 12 L. R. A. 823). The conclusion thus reached is not unreasonable, for the rule is elementary that, when a fact is peculiarly within the knowledge of a party, he must, if necessary, furnish the evidence thereof: *Weber v. Rothchild*, 15 Or. 385 (15 Pac. 650, 3 Am. St. Rep. 162). As the burden was on the defendant in this particular, he cannot complain of any lack of proof in this respect.

7. George Sorenson testified that about three or four months after the original option was canceled Storey made another offer to the witness to purchase the land, which bid he submitted to the defendant who said:

“‘We will keep on working on the deal. We will pull it through yet.’ * *

“Q. Can you state during what month in 1907, if at all, you continued to act in the negotiations, to bring about that sale?

“A. Well, I continued all the time, trying to put it through.

“Q. Can you state more definitely during what months in 1907 you went to Mr. Kribs about it?

“A. I used to go to his office pretty near every week or so.

“Q. During that year?

“A. Yes.

“Q. Did you, or not, have any conversation with Mr. Storey about it in that year?

“A. Yes, sir; all the time. I had the same office with him.

“Q. During that time, 1907, you may state whether or not the parties got together on any agreement about the price of the land.

“A. No, they never got together.”

Viewing this testimony in the light of the averment of the complaint that about July —, 1907, the defendant “continued the employment of the said George Sorenson and instructed him to negotiate further with said J. O. Storey,” it will be seen that though Sorenson persisted in his efforts to bring about a sale of the land to Storey after the original option was canceled, and for that purpose frequently conferred with Kribs about the matter, no assent was given by the latter relating to such sale until about three months after the oral option was declared forfeited. Here is testimony tending to show the making of a new contract. When the agreement was consummated is un-

important, provided it was concluded prior to May 22, 1909, when the amendment of Section 808, L. O. L., went into effect, declaring void any unwritten agreement thereafter entered into relating to the employment of a broker to sell land: Laws Or. 1909, c. 27. No error was committed in denying the motion for a directed verdict.

8. An exception having been taken, it is maintained by defendant's counsel that an error was committed in denying their fourth request to instruct the jury as follows:

"Defendant claims that, when the first deal with Storey fell through, he notified George Sorenson that his employment by the defendant was ended, and that if he desired to act as broker in the matter any further he must make an arrangement with said C. A. Smith. Defendant had a perfect right to terminate the employment of George Sorenson after the first deal with Storey fell through, and if said employment was terminated at said time so far as defendant is concerned, your verdict must be in favor of the defendant. A person who employs a broker may terminate the employment at any time, provided he acts in good faith, and there is no evidence in this case warranting any finding that defendant acted in bad faith in terminating said employment at said time, if he did so terminate it."

At the defendant's request the court in its general charge said:

"A broker must perform his contract while his employment lasts, and if he fails to do so before his employment has been terminated, he cannot recover anything for any services that he might have rendered up to the time his employment was so terminated. If he desires to protect himself, he may do so by providing in his contract that his employment shall last for a specified time; and if this is not done, it is the absolute right of the person who employs him to ter-

minate the employment at any time without any liability, provided he acts in good faith, and provided the broker has not at that time fully performed his part of the contract by obtaining a purchaser on terms acceptable to the seller of the property.”

It will be observed that the fourth request desired a direction to the jury that their verdict must be for the defendant if the employment of Sorenson was terminated when Smith withdrew the land from the market. The language thus employed omits an allegation of the complaint:

“That immediately after the defendant had failed to carry out said agreement as aforesaid (to sell the land to Storey), and on or about the — day of July, 1907, the defendant, assuming to act as the agent for said C. A. Smith, the owner of said land, and representing that he had authority from said C. A. Smith so to act, agreed with said Sorenson to obligate the said Smith to pay said Sorenson said commission, and continued the employment of the said George Sorenson, and instructed him to negotiate further with said J. O. Storey for the purpose of procuring said J. O. Storey to pay a higher price for said property,” etc.

From this allegation it is reasonably to be inferred that, though Sorenson's employment was terminated when the original option was declared at an end, he was subsequently engaged by the defendant to negotiate a sale of the land at a greater price, but upon the same terms as had been previously agreed upon. Sorenson's testimony on this issue, to which reference has been made, tends to substantiate the averment last quoted. The fourth request having omitted this matter, no error was committed in refusing to give that instruction, since its substance was embraced in the part of the charge that has already been repeated.

9, 10. It is insisted that error was committed in denying the sixth request to instruct the jury, as follows:

“Even if you should find that employment of George Sorenson continued after the first deal with Storey fell through, and should find all of the other facts in favor of plaintiff, said George Sorenson would not earn any commission until he had actually procured a purchaser on terms acceptable to said C. A. Smith. It is not claimed by plaintiff that in the employment of George Sorenson after said deal with Storey fell through the defendant or said C. A. Smith fixed any definite terms upon which said C. A. Smith would be willing to sell the land; [but, on the contrary, it appears that said terms were not finally agreed to on the part of said C. A. Smith until after said C. A. Smith had been assured that there would be no commission to be paid by him or said Kribs to George Sorenson or any other person in said sale, but that the price he was to receive for the property would be net to him]. George Sorenson would not earn any commission until he had actually procured the purchaser for the property on terms acceptable to said C. A. Smith, and therefore, if you find that said C. A. Smith refused to sell the property, except on condition that there should be no commission paid by him or said Kribs, and said Storey communicated said fact to George Sorenson, and thereupon George Sorenson waived all right to any commission and agreed with said Storey to get his pay out of a future sale of said property by said Storey, and thereupon said Storey and those associated with him completed said purchase and entered into a contract for the purchase of the same for \$300,000 net to said C. A. Smith, then plaintiff would not be entitled to recover, even though all the other facts were found in her favor.”

This request was denied, for the reason that the language embraced within the brackets, as indicated, assumed the existence of a fact which was in dispute.

It is argued by defendant's counsel that, though the instruction requested may have been technically incorrect, it was sufficient to call attention to Sorenson's alleged waiver as set forth in the answer, and, such being the case, the duty was imposed upon the court so to modify the language suggested as correctly to state the law applicable to the issue involved. The legal principle thus involved finds expression in 1 Blashfield's Instructions to Juries (2 ed.), Section 175, page 407, where it is said:

"In some jurisdictions it is held that a request which is properly refused for defects in form or substance may be sufficient to call the attention of the court to the matter upon which an instruction is desired, and make a failure to give an appropriate instruction thereon error."

In support of the text quoted the decisions cited, omitting criminal causes, were rendered by courts in the states of Kansas, Missouri and Texas. In addition to the cases from the states mentioned, the defendant's counsel further cite decisions given upon this subject by the courts of last resort in the states of Kentucky (*Western Union Tel. Co. v. Sisson*, 155 Ky. 624, 160 S. W. 168), Massachusetts (*Black v. Buckingham*, 174 Mass. 102, 54 N. E. 494), Vermont (*Hazard v. Smith*, 21 Vt. 123), and West Virginia (*Carrico v. West Va. R. Co.*, 35 W. Va. 389, 14 S. E. 12). "If a request," says a text-writer, "is in part incorrect, or is inappropriate as applied to the facts, the court commits no error in wholly refusing it": Branson, Instructions to Juries, § 101, citing many cases.

Another author discussing the same subject remarks:

"In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification

or omission. If the instruction, as requested, is objectionable in any respect, its refusal is not error": 1 Blashfield, Instructions to Juries (2 ed.), § 175, p. 402.

The cases cited to uphold the language last repeated, omitting decisions from states where their courts seem to have ruled on both sides of the question, are found in the reports of decisions in the courts of Alabama, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Maine, Maryland, Michigan, New York, Ohio, Oklahoma, Utah and Wisconsin. It will thus be seen that the great weight of authority is opposed to the contention now made with respect to this part of the case.

Our statute, relating to the giving of instructions, reads:

"In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact": Section 139, L. O. L.

"The jury, subject to the control of the court, in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is thereby declared to be conclusive. They are, however, to be instructed by the court on all proper occasions" in respect to precautionary matters: Section 868, L. O. L.

In applying these provisions of the law it has been held that, though each party to an action is entitled to have his theory of the cause submitted to a jury, if any evidence has been received tending to support such plan, no failure of the court in this respect would be considered on appeal, except upon the denial of a requested instruction which correctly stated the law applicable to the case: *Cerrano v. Portland Ry., L. &*

P. Co., 62 Or. 421 (126 Pac. 37). We adopt the rule prevailing in a majority of the states, to the effect that no error is committed in denying a requested instruction which does not correctly announce the law applicable to the case, or which contains or assumes the statement of a controverted fact, though such request may call the court's attention to a particular matter not covered by the general charge. If a contrary rule obtained, it would not be necessary for counsel carefully to prepare requested instructions, for, if merely calling attention of the court to a particular matter of law or fact were sufficient, then a request to charge on a special subject would be sufficient, though such solicitation was couched in the briefest possible sentence. Thus, in this instance: "We desire an instruction upon the question of waiver." Such a course of practice would not be fair to a court, which at the close of a trial has not the time carefully to consider all the matters that might thus be thrust upon it. Unless, therefore, the prayer for an instruction correctly states the law applicable to the case, and makes no improper allusion to controverted questions of fact, and the matters thus urged have not been given in the general charge, when considered in its entirety, no error is committed in denying the request: *Clearwater v. Forrest*, 72 Or. 312 (143 Pac. 998); *Kemp v. Portland Ry., L. & P. Co.*, 74 Or. 258 (145 Pac. 274); *Pfeiffer v. Oregon-Washington R. & N. Co.*, 74 Or. 307 (144 Pac. 762); *Housman v. Peterson*, 76 Or. 556 (149 Pac. 538); *Johnson v. Portland Ry., L. & P. Co.*, 79 Or. 403 (155 Pac. 375).

11. It is maintained by defendant's counsel that errors were committed in denying their requested instructions as follows:

“(16) Plaintiff cannot recover in this case if the original agreement between George Sorenson and F. A. Kribs was for the payment by Kribs to George Sorenson of a portion of the commission he would receive from C. A. Smith on the sale of the land, and if this original contract between George Sorenson and Kribs was never changed.

“(17) If the contract between George Sorenson and Kribs was for the division between Kribs, Sorenson and Storey of the commission which Smith would pay Kribs on the sale, and this agreement was never altered, then plaintiff cannot recover, and your verdict must be for the defendant.”

At the request of the defendant's counsel the jury were instructed as follows:

“This action is based on the theory that defendant assumed to hire George Sorenson as a broker for the sale of the land in question for a specified commission of 5 per cent, and represented that he had authority to bind C. A. Smith to such a contract. Therefore I charge you that, if you find that there was no specific agreement between George Sorenson and F. A. Kribs for the payment of 5 per cent commission, but that the amount of the commission George Sorenson was to receive was not agreed upon, then the plaintiff cannot maintain this action, and your verdict must be for the defendant.”

When the court had concluded its charge one of the jurors inquired:

“Do we have to find for the full amount?”

The court replied:

“This action is brought on a contract, and plaintiff is entitled to 5 per cent of the amount or nothing. The jury would not have any discretion to find an intermediate amount. It is either the full amount or nothing, and to that full amount should be added interest at 6 per cent, from the 31st of October, 1909, down to this date.”

The defendant's counsel interposed no objection to the court's reply to the juror's inquiry.

The part of the charge so given at the solicitation of defendant's counsel is inconsistent with their requests last referred to, which were denied. In respect to the issue designed to be embraced in the sixteenth request, the defendant testified that, under the terms of the original agreement for the sale of the land at \$187,000, the commission to be paid by the owner for procuring Storey as a purchaser was to be divided between the witness and Sorenson. Kribs further testified that after the original option was declared forfeited the broker was advised thereof, and notified that his services in negotiating contracts relating to the sale of the land were ended. Having acquiesced in the court's instruction that the plaintiff was entitled to the entire commission of 5 per cent of the selling price and interest thereon or nothing, the defendant has no reason to complain because of the refusal to give the sixteenth and seventeenth requested instructions.

12. A great part of the brief of defendant's counsel is devoted to what is termed the "broad equities" of the case. Thus it is stated in effect that by reason of Sorenson's representations made to Storey that, notwithstanding the limitation of 60 days specified in the original option, he could have all the time he desired in which to examine the lands offered for sale, in order to determine their value; that relying upon such statements Storey neglected to take the necessary precaution to protect his rights, whereby he incurred an expense of more than \$2,000 in cruising the timber and lost \$63,000, which profit he could have made by a resale of the property; that the ultimate contract for the sale of the land was made with Smith by Brat-

nobar, which agreement was brought about by Storey alone as the procuring cause, and the latter had only the right of a broker to negotiate a resale of the premises within a specified time; that such agency was secured by Storey, who hoped to obtain a compensation for the loss he had thus sustained; that it is undisputed, if Kribs is obligated to discharge the judgment rendered herein, Storey, in addition to the damages he has sustained in consequence of Sorenson's representations, will be obliged to repay the amount recovered in this action, thereby entailing an entire loss of about \$85,000, and thus demonstrating the unreasonableness of the conclusion reached by the jury in the trial of this cause.

The plaintiff's counsel contend, as alleged in the complaint, and as their evidence tended to show, that the land was sold by Smith to Storey, in the name of the Storey-Bracher Lumber Company and Bratnobar, with whom Storey had associated, and that Sorenson had negotiated with Storey in effecting a sale of the premises, which fact appears to be evidenced by the written contract therefor, from which the jury might reasonably have concluded that the broker was entitled to the commission demanded. The "broad equities" thus stated undoubtedly afford cogent reasons, when uttered, as they probably were, to the jury in order to obtain a favorable verdict for the defendant; but in a law action, where on appeal only alleged errors duly assigned can be considered, the argument now adduced has no place.

Believing no prejudicial error was committed at the trial, it follows that the judgment should be affirmed; and it is so ordered.

AFFIRMED.

MR. JUSTICE BEAN, MR. JUSTICE HARRIS and MR. JUSTICE BURNETT concur.

Argued October 30, affirmed December 5, 1916.

CLAYTON v. ENTERPRISE ELECTRIC CO.*

(161 Pac. 411.)

Statutes—Construction—Intention of Legislators.

1. Where the language of the lawmakers is plain and their intent clear, such meaning must be given effect.

Electricity—Regulation—Construction of Statutes.

2. The title of the employers' liability law (Laws 1911, p. 16) indicated that the act provided for the protection and safety of persons engaged in construction or other work upon buildings and other structures, or upon or about electrical wires, conductors or other electrical appliances carrying a dangerous current of electricity, or about any machinery or in any dangerous occupation, and defining the liability of employers for acts of negligence, or for the injury or death of their employees. Section 1 provided that all persons whatsoever engaged in the manufacture, transmission and use of electricity should see that all material was carefully selected, inspected and tested, and that in the transmission and use of electricity of a dangerous voltage full and complete insulation should be provided at all points where the public or the employees were liable to come in contact with the wires, and that all persons having charge of or responsible for any work involving a risk or danger to the employees or the public should use every device, care and precaution which it is practicable to use for the protection of life and limb. Section 4 made any person within the provisions of the act liable for any loss of life by violation thereof. *Held*, that the act was intended to safeguard members of the public from coming in contact with wires carrying a dangerous current, and was not limited to the protection of the immediate employees of electric companies.

Statutes—Validity—Title.

3. The provision of the law protecting the general public is not foreign to nor disconnected with the subject embraced in the title. The title was sufficient to direct the voters' attention to the measure to be acted upon, was not inconsistent with the general object and purpose of the initiative and referendum amendments to the constitution, and the statute is not invalid under Article IV, Section 20, of the Constitution.

Statutes—Validity—Title.

4. To render a portion of a statute invalid because its provisions are not embraced within the title, as required by Article IV, Section 20, of the Constitution, the provisions must be entirely disconnected with the subject, wholly incongruous, and consist of matter of which the title gives no notice, so that the adoption of the measure by means of the title would be fraudulent.

*On duty of electric light company with respect to wiring or fixtures installed in private property, see notes in 13 L. E. A. (N. S.) 236; 20 L. E. A. (N. S.) 816; L. E. A. 1915C, 570. REPORTER.

Constitutional Law—Validity of Statute—Presumption.

5. The presumption is always in favor of the validity of the statute, and its repugnancy to the Constitution must clearly appear.

Electricity—Actions for Injury—Sufficiency of Evidence—Ownership of Wires.

6. In an action for the death of an employee of a patron of an electric power company, when he attempted to turn off the switch in his employer's pumping plant, evidence held sufficient to take to the jury the question whether the power company owned and controlled the wires and switch.

Electricity—Degree of Care Required.

7. The care demanded of electric companies must be commensurate with the danger, and where their wires are carrying a dangerous current, the law imposes upon them the utmost degree of care in the construction, inspection and repair.

[As to duties and liabilities of electrical companies, see note in 100 Am. St. Rep. 515.]

Electricity—Liability of Company—Ownership of Switch.

8. Where an electric power company furnishes the current for operating a pump owned by an individual, and owns the wires leading to the switch, which was installed by the company's predecessors, the company can exercise control over the switch, even if it does not own it, and is liable under the employers' liability law if the switch is defective.

Electricity—Liability of Companies—Installation of Apparatus.

9. Where an electrical company undertakes to render service to a customer, and runs its wires into a building, and installs its apparatus therein, it must exercise a degree of care commensurate with the risk in protecting and insulating its wires and installing the apparatus.

From Wallowa: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

The plaintiff, Ella Clayton, as the widow of W. S. Clayton, deceased, brings this action for damages under the employers' liability law against the defendant, to recover for the death of her husband, caused by an electric shock which he received while attempting to turn off the power furnished by the defendant to a motor pump operated by one Carl Roe, by whom he was employed. Without quoting the allegations of the complaint, it may be stated that on August 5, 1912, the defendant, Enterprise Electric Company, a corporation, was engaged in the manufacture, transmission

and use of electricity of a dangerous voltage. At the time one Carl Roe was the owner of a pumping plant on the Wallowa River, a short distance below the town of Enterprise, and was engaged in pumping water from that river to irrigate certain lands situated above the stream. The pumping plant, machinery and motor for the same were contained in a small lumber building about 9x18 feet. Prior to the date mentioned, under an arrangement with Roe, the defendant had connected its wires and transmission system, upon which a dangerous voltage of electricity was being carried, with the motor and machinery of this pumping plant, and had placed thereon certain switches and other apparatus. Plaintiff alleges that the defendant was the owner and controlled and operated the transmission system, and the wires and appliances by which the currents of electricity were carried into and connected with the motor and pumping machinery, and was engaged in furnishing the pumping plant with electricity, conveying the same to the motor by the wiring, switches and apparatus. Omitting the part of the complaint not relied upon at the trial, plaintiff claimed that the defendant was negligent in the following respects:

“(1) That the defendant being the owner of and controlling and operating the transmission system and the wires and appliances by which the electric currents were carried into and connected with the motor in the pumping plant owned by Carl Roe, carelessly and negligently failed to cover and inclose the dangerous machinery, switches and wiring by means of which said electricity was connected with said motor.

“(2) That the defendant, being the owner of and controlling and operating said transmission system and said wires and appliances by which said electricity was conveyed from said transmission system to said motor, carelessly and negligently failed thoroughly,

effectively and perfectly to insulate said wiring, switches and apparatus. • •

“(5) That the defendant carelessly and negligently used an insufficient and dangerous switch, the blades of which were not insulated, and negligently failed to use a fully insulated switch at a point where the public and the employees of Roe were likely to come in contact with the same, though a fully and completely insulated switch was practicable to be used without interfering with the efficiency of the pumping plant.”

On the day mentioned, while in the employ of Carl Roe, W. S. Clayton, deceased, was required to attend to the operation of the pumping plant, turn off and on the electric power, set the plant in operation, and stop the same again as required by the business. In the afternoon of that day it became his duty to turn off the power, and in order to do so he entered the building and turned off the electricity from the motor, by opening the switch and disconnecting the wiring and transmission plant of the defendant with the same. While attempting this, by reason of the negligence of the defendant, as set forth, he received a violent shock of electricity from the wiring, switches and apparatus of the defendant and the high and dangerous current, voltage and amperage of electricity passed through his body killing him.

The answer of defendant denied the allegations of negligence contained in the complaint and affirmatively set forth contributory negligence on the part of Clayton. It also alleged affirmatively that at the time of the accident the defendant was not the owner of, did not have the right to, and did not exercise any supervision, control or direction over, the interior of the pumping plant or building, or over any of the machinery, switches, apparatus or appliances installed therein, and that it owed no duty to plaintiff's deceased.

The reply put in issue the affirmative matter of the answer, except the allegation that W. S. Clayton was not in the employ of the defendant at the time of his death. The cause was tried before a jury, resulting in a verdict in favor of plaintiff for the sum of \$5,000, upon which judgment was entered, from which judgment this appeal is prosecuted. **AFFIRMED.**

For appellant there was a brief over the names of *Mr. A. S. Cooley* and *Messrs. Griffith, Leiter & Allen*, with an oral argument by *Mr. Rufus A. Leiter*.

For respondent there was a brief with oral arguments by *Mr. Daniel Boyd* and *Mr. Alfred S. Bennett*.

MR. JUSTICE BEAN delivered the opinion of the court.

The defendant raises but three points upon this appeal, and relies upon three assignments of error: (1) Overruling the defendant's demurrer to plaintiff's complaint; (2) denying plaintiff's motion for a nonsuit; (3) refusing to instruct the jury to return a verdict for the defendant. These points may be considered together. The main question involved is presented as a new one. It is contended on the part of the defendant: First, that the employers' liability law applies only to the relationship of employer and employee, and does not create any right of action in a member of the general public; second, that the title of the act is not broad enough to include protection to members of the general public, and if it is that subject is not expressed in the title; and third, that Article IV of Section 20 of the state Constitution was not complied with, and the act to that extent is not constitutional, within the rule announced in *State v.*

Richardson, 48 Or. 309 (85 Pac. 225, 8 L. R. A. (N. S.) 362).

1, 2. The title of the employers' liability law (Gen. Laws 1911, p. 16) is as follows:

"An act providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks and other structures, or engaged in any work upon or about electrical wires, or conductors or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or about any machinery or in any dangerous occupation, and extending and defining the liability of employers in any or all acts of negligence, or for injury or death of their employees, and defining who are the agents of the employer, and declaring what shall not be a defense in actions by employees against employers, and prescribing a penalty for a violation of the law."

That part of the act necessary to here note reads thus:

Section 1: "All owners, contractors, subcontractors, corporations or persons whatsoever engaged * * in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatever, shall be carefully selected and inspected and tested so as to detect any defects. * * And in the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided at all points where the public or the employees of the owner, contractor or subcontractor transmitting or using said electricity are liable to come in contact with the wire, * * and generally all owners, contractors or subcontractors, and other persons having charge of, or responsible for any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practica-

ble to use for the protection and safety of life and limb. * * ,”

Section 4: “If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children,” etc., “shall have a right of action without any limit as to the amount of damages which may be awarded.”

From the language of the statute, which makes three special references to the safety of the general public, or the public, it seems there can be no doubt but that the provisions of the law are intended to safeguard members of the public from injury by coming in contact with wires or appliances owned and controlled by an electric company and used in the transmission and application of electricity of a dangerous voltage. It is a cardinal principle of statutory construction that, where the language of the lawmakers is plain and its intent clear, such meaning shall be given effect. That the provisions of the employers' liability law are more frequently applied to affairs between employer and employee does not lessen its force, so far as applicable, in prescribing a rule of conduct for those engaged in dealing with such a dangerous and subtle element as electricity, in order to increase the safety of those who in the performance of their duty are liable to come in contact with the agencies employed in generating and conveying such current, even though such persons may not be in the immediate employ of such manufacturer or person conveying electricity.

The act first enjoins upon the owner, corporation or person engaged in the manufacture, transmission and use of electricity the duty of seeing that all material shall be carefully selected, inspected and tested so as

to detect any defects; second, it commands that, in the transmission and use of electricity of a dangerous voltage, full and complete insulation shall be provided at all points where the public or the employees of the owner, etc., are liable to come in contact with the wire; and, third, generally, as though to leave no doubt or room for escape, the law requires that such owner or person in any work involving a risk or danger to employees or the public shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machinery or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances or devices. It is not necessary to decide under which of the three classes referred to the facts in the case shall be classed. The first and last seem to be particularly applicable. The general clause appears to be intended to cover all cases relating to the care required in the control of electricity, not coming within the specifications of the second class. The title of the act plainly shows the purpose, more fully set forth in the body of the act, to protect all persons working around high voltage wires, without regard to whether they are employees of the electric company or not. The enactment is for the protection of life and limb, and should be given a fair and liberal construction in the interest of public safety and protection of human life: *Blair v. Western Cedar Co.*, 75 Or. 281 (146 Pac. 480).

3, 4. The next question is: Is the act repugnant to our Constitution in so far as it applies to any other than the relationship of employer and employee? In order to render a portion of a statute invalid for the reason that its provisions are not embraced within

the title of the act in conformity with Article IV, Section 20, of the Constitution, such provisions must be entirely disconnected with the subject as embraced in the title, wholly incongruous, and consist of matter of which the title gives no notice, so that the adoption of such measure by means of the title would be fraudulent.

5. The presumption is always in favor of the validity of a statute, and its repugnancy to the Constitution must clearly appear. If the matter is reasonably connected with and germane to the title under our Constitution requiring an act to embrace but one subject and matters connected therewith, which subject must be embraced in the title, the law will be upheld: *State v. Shaw*, 22 Or. 287 (29 Pac. 1028); *Clemmensen v. Peterson*, 35 Or. 47 (56 Pac. 1015); *Pacific Elev. Co. v. Portland*, 65 Or. 349 (133 Pac. 72, 46 L. R. A. (N. S.) 363). The employers' liability law was proposed by initiative petition and adopted by the electors of the state. If it be assumed that the same rule would apply to it as to a legislative enactment, we think the title of the act is broad enough to include the protection of all persons who are from necessity liable to come in contact with the electric wires charged with a dangerous voltage of electricity. It cannot be held that the part of the law to which reference has been made is foreign to or disconnected with the subject embraced in the title. The title to the act was sufficient to direct the voters' attention to the measure to be acted upon and was not inconsistent with the general object and purpose of the initiative and referendum amendment to the Constitution. No fraud was perpetrated upon the voters by virtue thereof: *State v. Langworthy*, 55 Or. 309 (104

Pac. 424, 106 Pac. 336). The enactment is not inimical to the Constitution, and is valid.

6. It is argued by the learned counsel for the defendant that the apparatus complained of in the present case was under the control of Roe; and an electric power company furnishing current is not bound to examine nor inspect fixtures or appliances used by its customers and under their supervision. The evidence introduced tended to show substantially the following facts:

The defendant, a public service corporation, was engaged in generating electricity and furnishing it to the public, either to houses and places of business, or on the streets as there might be a demand. Carl Roe, the employer of the decedent, was engaged in operating a pumping plant on the banks of the Wallowa River by which water was pumped to the hill. The power for the plant was furnished by the defendant company. When Roe got his motor installed and lined up, he notified the electric company, which was then owned by a partnership consisting of Mr. Forsyth and Mr. Haas. The latter leased his interest in the plant to Forsyth, who was the sole manager of the concern, and who proceeded to connect up the line with the pumping plant. He wired about 150 feet from the main line to the building in which the pump was situated. He put in the wires connected with the switch, which was located just inside of the building, and also installed the switch itself and the wire extending from it to the motor. The evidence as to who actually owned and controlled the switch is conflicting. It was picked up and put together from two old switches. Neither party seems willing to claim the ownership. Before the installation thereof the wire and the switch had been owned by the electric

company. At the time Roe was altogether ignorant of electricity and the company knew that fact. There was no transformer or meter used, and the full current generated by the electric company for the purpose of furnishing the City of Enterprise with electricity and power was intended to pass over the line and through the motor. The pump was not supposed to run in the evening, however, when all the lights of the city were on. The usual voltage on the line was 2,300 volts, which was a high and dangerous current, necessarily fatal to any human life subjected to it.

The system used by the electric company was a three-wire or three-phase current, and the switch placed in the building was not an oil switch nor insulated in any way. It was a jack-knife switch, having blades about fifteen inches long and about nine or ten inches across, and which were entirely bare and uninsulated. When the switch was turned on or off, one coming in contact therewith—that is, with that portion next to the wire extending toward the main line—would receive a shock. While these switches were appropriate for a low current, where there was no danger to life or limb, they were not suitable for such voltage as was carried over the wires in question. They were exceedingly dangerous if anyone came in contract with them. When the switch was opened and closed, fire would frequently flash for a distance of three or four inches from the switch. An oil switch, such as is usually used on high-voltage wires, would have entirely insulated the wire and the current, and would have been much safer for the operator. On account of the danger a stick about three or four feet long had been prepared to hook over the handle of the switch and pull it open and shut. Clayton was entirely ignorant in relation to electricity.

He had turned the current off and on only a few times prior to the occurrence causing his death. On that date he went down late in the evening to shut off the motor. The building in which it was contained was situated at the front of a steep hill partly surrounded by brush and trees. There were no windows in the building and the only means of light was the door in front. In some way the decedent attempted to disconnect the wire carrying the current to the motor, and got against the uninsulated blades of the switch, and the whole current passed through his body, causing instant death. It was apparent, from the burns on his hand and on his leg, that he got against the uninsulated appliance.

It is claimed by plaintiff, and the jury must have so found, that defendant owned and controlled the current of electricity and transmitted it to the motor operated by Roe; that it also controlled and owned the wiring and switch carrying the current to the motor, at least as far as to the switch. The evidence tended to show that as a general rule an electric company owns and controls the line of wires to the meter where there is one, and where there is none to the switch or fuse blocks, which are usually combined, and that the pumping plant was located upon the land with the consent of Mr. Forsyth, the manager of the electric plant. The trial court submitted to the jury the disputed questions of fact relating to the switch and appliances by instructions of the import of the following charge:

“If you find from the evidence that the defendant did not have the right to, and did not, exercise any supervision, dominion, control or direction over the appliances, apparatus or switches in said pumping plant, but that the right to exercise such supervision, dominion, control and direction was vested in the owners of the pumping plant, or persons other than

the defendant, then I instruct you that the defendant would not be liable for any accident caused by the condition of any such apparatus, switches, or appliances.”

7. The care demanded of electric companies must be commensurate with the danger, and where their wires are carrying a high and dangerous current of electricity, the law imposes upon the company the utmost degree of care in the construction, inspection and repair, so as to keep them in a safe condition at places where persons are liable to come in contact with them: *Perham v. Portland E. Co.*, 33 Or. 451 (53 Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799); *Gentzkow v. Portland Ry. Co.*, 54 Or. 120 (102 Pac. 614, 135 Am. St. Rep. 821); *White v. Elec. Co.*, 75 Wash. 139 (134 Pac. 807); *McLaughlin v. Light Co.*, 100 Ky. 173 (37 S. W. 855, 34 L. R. A. 812); *Commonwealth Elec. Co. v. Melville*, 210 Ill. 70 (70 N. E. 1052, 1055). The question as to whether the defendant company owned and controlled the wires and switch at the point where the injury occurred, and whether or not it at the time transmitted electricity over the same to the motor, were questions for the jury: *Taffe v. Oregon Ry. & N. Co.*, 60 Or. 177 (117 Pac. 989).

8. About the question of control, let us suppose that an irrigation company was owning and operating a water ditch, and furnishing water to users for the purpose of irrigating lands, would it be said that such company could deliver its water and perform its duty by allowing the same to flow in its canal and out into the lateral ditch of a water user, without any gate or other contrivance to control the outflow? Or would such a company be required, even in the absence of a statute specifically directing the same, to establish a gate or means of controlling the discharge of the

water from its ditch, so as to keep the quantity within a limit that would not ordinarily cause damage? Would not such a company be responsible for the management and control of such water until the same was delivered out through its gate onto the land of the owner? Could such an irrigation company say it was the duty of the user to supply the gate? In the present case the switch in question served a purpose similar to such a headgate, and it seems to us to mark the line of control and responsibility of the furnishing company. Indeed, it is stated in the brief of the learned counsel for the company that the defendant's control over the current ceased at the switch, contending, however, that the switch was no part of the transmission system. On the other hand, plaintiff asserts that it would be a mighty technical holding, if the defendant so owned the wire to the switch, to hold that it was not liable for the switch itself, which was directly connected with and part of the wire, which left the wire practically uninsulated at that end. It is contended upon the part of plaintiff that, if the jury should have found that the electricity was delivered at the switch, it would be a case of joint control, where either party would be responsible for injuries occurring at that point, and would be similar to two railroads having a joint depot at the junction, where both are or either is responsible for any defective condition of the surroundings: *Louisville etc. Ry. Co. v. Lucas*, 119 Ind. 583 (21 N. E. 968, 6 L. R. A. 193); *Lucas v. Pennsylvania R. R. Co.*, 120 Ind. 205 (21 N. E. 972, 16 Am. St. Rep. 323); *Harrill v. South Carolina etc. R. R. Co.*, 135 N. C. 601 (47 S. E. 730); *Robinson v. Chicago etc. R. R. Co.*, 135 Mich. 254 (97 N. W. 689); *Wabash etc. Ry. Co. v. Wolff*, 13 Ill. App. 437; *Herrman v. Great Northern Ry. Co.*, 27 Wash.

472 (68 Pac. 82, 57 L. R. A. 390); *Seymour v. Railway Co.*, 3 Biss. 43 (21 Fed. Cas. 1113); *Watson v. Railway Co.*, 92 Ala. 320 (8 South. 770); *Louisville etc. Ry. Co. v. Treadway*, 142 Ind. 475 (40 N. E. 807, 41 N. E. 794).

9. It may be explanatory to state the general rule beyond the point of delivery or switch, which we find in 1 Joyce, Electrical Law, Section 445b, as follows:

“Though an electrical company is not an insurer, yet where it undertakes to render service to a customer, and for this purpose runs its wires into a building and installs its apparatus therein, it is under the obligation, both in doing this and in maintaining the wires and apparatus, to exercise a degree of care which is commensurate with the risks involved, having in view such injury as may result either from improperly protecting or insulating its wires or from improperly installing the apparatus. And this obligation cannot be avoided by the company by hiring someone else to do the work required.”

The company was not required to connect its line of wires with an improper switch or other device, nor to maintain the same without proper connections: *First Nat. Bank v. Pacific Tel. & Tel. Co.*, 81 Or. 307 (159 Pac. 561). There were two ways for such installation: (1) For the company to furnish everything reasonably necessary and charge Roe therefor; or (2) to require Roe to procure the needed appliances at his own expense, which amounts to the same thing. The company is a public service corporation, and is entitled to compensation for whatever it does. The ownership of the appliance is not the controlling element. It cannot be supposed that an electric company would permit an independent person or concern to connect its wires with a motor like Roe's. Neither did this company delegate that duty to another, when the motor was installed and the connection made

for furnishing the power for pumping. There was nothing to prevent the defendant from supervising and controlling the switch and apparatus in the powerhouse. The case differs somewhat from that where an electric current to the amount needed, and not of sufficient voltage to be dangerous, is furnished for lighting a building. The case of *Dygert v. City of Eugene*, 72 Or. 1 (143 Pac. 643), is somewhat analogous. In that case the city and the electric company were successfully sued together for an injury caused by the hanging and maintaining of the city's wires too close to the heavily charged wires of the power company, by which the wires of the latter were overcharged, to the injury of the plaintiff, who was a customer of the power company.

Remarks which apply with much force to the case in hand were made by that eminent jurist, Presiding Justice BISSELL, in the case of *National Fire etc. Co. v. Denver Consolidated Electric Co.*, 16 Colo. App. 86 (63 Pac. 949), cited by defendant. In rejecting the contention that the electric company was liable for the imperfect and uninsulated condition of wires in a building to which it supplied electricity, although the company did not do the work of construction of the inside wires, he said:

"It is a matter of common knowledge, and in fact of universal knowledge, that an electric current is dangerous and must be discreetly and prudently handled in order to avoid danger either to life or to property. We are quite ready to concede that, when an electric light company undertakes to supply a dangerous current to a dwelling-house or to a building, they are bound to see that the wires they put in and the connections they make are properly insulated and protected, so that no harm will come to the property. Where, however, they are only employed to deliver the current by connection with wiring already made by

the individual who owns the property, it seems to us that their responsibility ends when the connection is properly made under proper conditions and they deliver the current in a manner which will protect both life and property."

In the case at bar the connection between the electric wire of the defendant company which was indisputably placed, owned and controlled by it, and the wire inside the pump-house leading to the motor, the control of which is in dispute, was made by means of a switch which was in a dangerous condition and the immediate cause of the injury. This connection, gate or switch was not beyond the border line of the responsibility or control of the electric company. Whatever may be said about the control or liability for the management of the electric energy on the motor side of the connection or switch, or whoever may have borne the expense of the wiring next to the motor, or the installation of the delivering appliances or switch, under the statute of this state it was the duty of the electric company installing the switch and making the connection for power purposes to use every device, care and precaution which it was practicable to use for the protection and safety of life and limb in the transmission of this subtle and dangerous element. This duty is clearly enjoined upon it by the Employers' Liability Act, and cannot be evaded or lessened by showing that a few years ago, when the contrivance was installed, the consumer contributed the cost thereof, and in order to render the burden light, an old, dangerous, uninsulated and unprotected contrivance was permitted by the predecessor of the defendant company to be used as a switch. The evidence tends to show—in fact, it is practically beyond controversy—that the defendant company, in

the transmission of the electric power to be used in the pumping station and for other purposes beyond that place, which was of a dangerous voltage, failed and neglected to make use of an appliance such as a switch or device with full and complete insulation or protection, or to use a transformer, so as to make the same as safe as practicable in order to protect the lives and limbs of those who would necessarily be in close proximity to the same and were liable to come in contact therewith, especially the operator of the motor of the patron of the company.

There was no error in overruling the demurrer to plaintiff's complaint. Under the facts in the case the jury was warranted in finding a verdict against defendant, and there was no error in denying the defendant's motion for a nonsuit, or in overruling its motion for a directed verdict.

The judgment of the lower court will therefore be affirmed.

AFFIRMED.

Argued October 31, modified December 12, 1916.

OLIVER v. CRANE.

(161 Pac. 254.)

Attorney and Client—Action for Fees—Answer—Contingent Fee Contract.

1. In an action for attorney's fees, where the complaint alleged that the fees were in part agreed upon and asked for a reasonable value of the balance, an answer generally denying allegations of the complaint "except as hereinafter alleged," and then alleging that the services were rendered on a contingent fee and no damages were recovered, was sufficient to raise the issue that plaintiff was employed on a contingent fee contract.

[As to right of attorney to recover compensation, see note in 127 Am. St. Rep. 841.]

Appeal and Error—Disposition of the Case—Increasing Judgment—Undisputed Evidence.

2. In an action for attorney's fees, where the evidence as to part of the employment and the reasonable value of the services rendered thereunder was undisputed, but the jury returned a verdict only for the amount actually expended by the attorney, the Supreme Court will add to the judgment the uncontroverted value of the services not contested.

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement PER CURIAM.

This is an action by Turner Oliver against Susan Crane, Lonzo Crane and Christopher Crane.

Testimony on behalf of the defendants in relation to the contract involved in the first cause of action was given as follows:

"He was employed to fight the company. I asked him how much percentage he wanted, and he said \$10 on the \$100 for the first \$500, and after that \$25—what he got. It was to come out of what he got out of it, if we sold it to the company."

This was an action to recover the value of legal services rendered by plaintiff to defendants. The first cause of action alleged that in November, 1908, defendants became jointly indebted to Ramsey & Oliver in the sum of \$316.67 for services rendered as attorneys in defending an action brought against defendants by the Oregon Railroad & Navigation Company; that thereafter defendants employed said firm to try said action in the Supreme Court of the State of Oregon on appeal, agreeing to pay a reasonable compensation therefor and to repay any moneys they should advance on said appeal; that said firm did try the action in the Supreme Court; that their services were reasonably worth \$250, and that they advanced a filing fee of \$10 and \$32 for printing briefs, no part of which has been repaid, except the sum of \$40; that the case was sent back to the Circuit Court for retrial, and was after-

ward dismissed by the plaintiff, Oregon Railroad & Navigation Company, and that there is now due and owing from said defendants for said services the sum of \$568.67; that Ramsey has assigned his interest to plaintiff. For a second cause of action it was alleged that in October, 1909, the defendants employed plaintiff to bring any necessary action or actions to enforce their rights against the Oregon Railroad & Navigation Company in certain real estate owned by defendants in La Grande, Oregon, which the said company had seized and appropriated to their own use, and to defend any action that might be brought against defendants concerning said lands by said company, and agreed to pay him a reasonable compensation for his services; that pursuant to this agreement plaintiff commenced an action in ejectment against said company, which was tried out in the Circuit Court, and that the reasonable value of plaintiff's services in said court was \$500, and that plaintiff advanced costs for trial and reporter's fees amounting to \$16.50; that said action was appealed to the Supreme Court by both parties, and that plaintiff's services in trying the case in the Supreme Court were worth \$154.80, which defendants undertook and promised to pay; that there is due in said behalf \$1,171.30. For a third cause of action plaintiff alleges that in December, 1910, the defendants employed him to commence an action of ejectment in the Circuit Court against the City of La Grande in respect to lands owned by them, and agreed to pay him what his services should be reasonably worth; that said action is still pending, and that \$100 is a reasonable compensation for said services. Defendants answered the first cause by a general denial "except as hereinafter alleged," and by what is termed a further and separate answer they allege:

“That they are not indebted in any sum of money whatever to Ramsey & Oliver, or to the plaintiff, for that the litigation mentioned in the first cause of action was to be conducted by said Ramsey & Oliver on a contingent fee, whereby they were to have one third of the damage recovered, and were to pay the costs of said litigation themselves, and hold the defendants harmless therefrom; that no damages were recovered, and defendants allege that they do not owe Ramsey & Oliver or the plaintiff anything for said or any services.”

There was a like general denial of the second cause of action, and an affirmative allegation in respect thereto as follows:

“That with respect to the litigation referred to in defendant’s second, further and separate answer and defense the defendants entered into an agreement with the plaintiff whereby he was to furnish the legal services in connection with said litigation on a contingent fee of one third of the damages recovered; that the defendants recovered in said action the sum of \$1 damages, whereby they owe the plaintiff one third of said amount, and no more.”

As to the third cause of action there was a general denial coupled with the words “except as hereinafter alleged,” but nothing is affirmatively pleaded in the answer. Motions to strike out each separate answer were interposed and overruled, as were demurrers to each of the defenses; and, a reply having been filed, the case went to trial, and the plaintiff had a verdict and judgment for \$223.63, from which he appeals.

MODIFIED.

For appellant there was a brief over the names of *Mr. Turner Oliver* and *Mr. Joel H. Richardson*, with an oral argument by *Mr. Oliver*, *in pro. per.*

For respondent there was no appearance except a brief submitted over the names of *Mr. Charles H. Finn* and *Messrs. Crawford & Eakin*.

Opinion **PER CURIAM**.

1. Taken as a whole, the denials to the first two causes of action are sufficient to raise the issues to which the defendants' testimony was directed. Objection was made to the admission of certain letters of plaintiff to the defendants, but we are of the opinion that they had at least a remote bearing upon the issues tried and were admissible.

2. As to the third cause of action the testimony of plaintiff indicated that plaintiff was employed as alleged, and that the services were worth the sum of \$100, and this testimony was uncontroverted. The court should have directed the jury to include this amount in any verdict which they might render. It is apparent that the jury returned a verdict for plaintiff only for the amounts of money actually expended by him on behalf of the defendants, and we will add thereto the sum of \$100 for services in the case against the City of La Grande and affirm the judgment as so amended. The plaintiff will have judgment here for the sum of \$323.63, and his costs and disbursements in this court and in the Circuit Court. **MODIFIED.**

Argued October 31, affirmed December 12, 1916.

BEST v. PARKES, JUSTICE OF THE PEACE,

(161 Pac. 255.)

Mandamus—Subjects of Relief—Change of Venue.

1. Section 2432, L. O. L., providing that the justice of the peace may change the place of trial when it appears from the affidavit of a party that the justice is so prejudiced against the party making the motion that he cannot expect an impartial trial before such justice, does not require a justice of the peace to grant a change of venue upon the mere assertion of the party that the justice is prejudiced, and therefore an alternative writ of *mandamus* to compel a justice of the peace to grant a change of venue, which contains no showing as to prejudice, except the conclusion of the party applying for the change, must be quashed under Section 613, L. O. L., authorizing *mandamus* to require action by an inferior court in the discharge of its functions, but not to control judicial discretion.

[As to prohibition as remedy to review determination of motion for change of venue, see note in ANN. CAS. 1913D, 596.]

From Umatilla: GILBERT W. PHELPS, Judge.

In Banc. Statement PER CURIAM.

The plaintiff, J. A. Best, sought by *mandamus* to compel the defendant, Joe H. Parkes, a justice of the peace for Pendleton District, to change the place of trial of a criminal action, wherein the plaintiff here was the defendant. In the alternative writ issued by the Circuit Court there appeared a history of the criminal action against the plaintiff, showing that it was brought to issue, and, after stating the filing of a motion and affidavit for change of venue, the writ contains this averment:

“That the said J. A. Best duly and regularly swore to the said affidavit, and stated therein, under oath, that the said J. A. Best knew the said Joe H. Parkes, justice of the peace for Pendleton District; that the said Joe H. Parkes, justice of the peace for said district, is so prejudiced against the defendant that the defendant could not expect a fair and impartial trial before the said justice.”

Other recitals are to the effect that the justice refused to grant a change of the place of trial, and he was required to show cause why he did not transfer the hearing to some other justice. Upon the return and the reply thereto the writ was quashed, and the plaintiff appealed.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Fee & Fee*, with an oral argument by *Mr. Alger Fee*.

For respondent there was a brief over the names of *Mr. George M. Brown*, Attorney General, and *Mr. Frederick Steiwer*, District Attorney, with an oral argument by *Mr. Brown*.

Opinion PER CURIAM.

1. It is provided, in substance, in Section 2432, L. O. L., that the justice may change the place of trial when it appears from the affidavit of a party either that the justice is a party to or directly interested in the event of the action or connected by consanguinity or affinity within the third degree with the adverse party or those whom he represents; (2) "that the justice is so prejudiced against the party making the motion that he cannot expect an impartial trial before such justice"; and (3) that the convenience of parties and witnesses will be promoted. Section 613, L. O. L., relating to *mandamus*, authorizes it to require action by an inferior court in the discharge of its functions, but says it shall not control judicial discretion.

It may be admitted that where the showing made before the inferior court conclusively establishes a situation requiring a change of venue under the statute, the writ will issue, compelling the action desired. A

case of this kind is *Krumdick v. Crump*, 98 Cal. 117 (32 Pac. 800), where it was admitted on the record that the judge was disqualified because he had been of counsel in the very case. The statute in that case used the mandatory language that the venue "must" be changed under such conditions. The other cases cited by the plaintiff are largely upon the same lines. The question here is whether such a showing is made in the writ. The allegation quoted is all that appears in the record about what was charged before the justice to induce a change in the place of trial. There are no facts stated from which an impartial judge could draw the same conclusion reached by the pleader or the affiant that the justice was prejudiced. The excerpt from the writ is not aided by the case of *Rugenstein v. Ottenheimer*, 78 Or. 371 (152 Pac. 215). There the affidavit set out the very language used by the judge whose fairness was impugned. The words he used were not disputed. They clearly indicated a decided hostility on his part toward the defendant. The situation there portrayed is quite different from the one in question, where merely the conclusion of the affiant is embodied in the statement.

In the very nature of things the judge himself is called upon to determine his own bias on the one hand or freedom from partiality on the other. Before his decision can be disturbed by *mandamus*, sufficient must appear in the showing made before him and reproduced before the court issuing the writ whereby the latter tribunal can determine, as a matter of law, that the justice is indeed prejudiced within the meaning and extent of the statute. To hold otherwise would be to substitute the interested judgment of a litigant for the judicial function of the officer. The law does not vest in the accused the discretion of selecting the

court in which he will be tried, yet he could enforce that as a principle if it were sufficient for him barely to say that the judicial officer is prejudiced against him.

The decision of the Circuit Court is affirmed.

AFFIRMED.

MR. JUSTICE BEAN took no part in the consideration of this case.

Argued October 31, affirmed December 12, 1916.

**WESTERN FARQUHAR MACHINERY CO. v.
BURNETT.***

(161 Pac. 334.)

Bills and Notes—Non-negotiable Instruments—What Constitute.

1. A promissory note, by which the maker agreed to pay a sum certain for value received on a date certain, with interest, which recited that it was given for the purchase of a threshing machine, to which title was reserved in the payee of the note, with right to declare forfeiture at any time for nonpayment, even before the due date, is a non-negotiable instrument.

[For case and notes in point, see 125 Am. St. Rep. 185; 14 Ann. Cas. 1226.]

Bills and Notes—Non-negotiable Instrument—Purchasers in Good Faith—Rights.

2. The purchaser of a non-negotiable instrument takes it subject to all the equities between the original parties, so that, where a note was given for the purchase price of a thresher under warranty and the machine was not as warranted, it was unnecessary to show that the payee was the agent of the assignee in making the sale.

*Upon the subject of negotiability of note, as affected by provision accelerating maturity, see notes in 35 L. R. A. (N. S.) 390, 392; L. R. A. 1915B, 472. See, also, L. R. A. 1915F, 777; L. O. L., § 5834; 8 C. J. 139, § 239.

Negotiability, as affected by provision for attorney's fee, see note in L. R. A. 1915B, 928; *Peyser v. Cole*, 11 Or. 89 (4 Pac. 520, 50 Am. Rep. 451); *Cox v. Alexander*, 30 Or. 433 (46 Pac. 794); 8 C. J. 148.

REPORTER.

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE McBRIDE.

This is an action by the Western Farquhar Machinery Company, a corporation, against J. P. Burnett upon a promissory note, which is in the following form:

“\$400.00.

“No. One. La Grande, Oregon, Sept. 10, 1915.

“November 15, 1915, after date, for value received, I, or either of us promise to pay to the order of the Oregon Co-operative Association four hundred and no—100 dollars, payable at La Grande, Oregon, with 8 per cent interest from date. This note is given upon the purchase of one rake separator 22x28 with straw carrier, feeder tables and bagger, one nine horse Alamo engine mounted upon trucks upon the express condition the title or ownership does not pass from the said Union County Co-operative Association until this note and interest is paid in full, and the said Union County Co-operative Association or their assigns are hereby fully authorized and empowered to declare this note due any time they may feel insecure, even before the maturity of the note if they so elect, may take possession of said one rake separator 22x28 with straw carrier, feeder tables and bagger. One nine horse Alamo engine mounted on trucks, and upon its sale credit to the amount of the note. And in case suit or action is instituted to collect this note, or any portion thereof, I, or either of us promise and agree to pay in addition to the costs and disbursements provided by statute, such additional sum as the court may adjudge reasonable for attorney's fees to be allowed in said suit or action.

“P. O. Address, Hilgard, Ore. Due ———.

“B. P. BURNETT.”

It was alleged that the payee, the Oregon Co-operative Association, indorsed the note to plaintiff before due, and that plaintiff is now the owner and holder of the same.

Defendant answered, admitting the execution of the note, but denied that it was transferred or delivered before due for value, and alleged that the note was executed in favor of the Oregon Co-operative Association at the request of plaintiff; that the said association was the agent of plaintiff in making the sale; that the machine described in the note was sold to the defendant at that time by plaintiff, acting through the Oregon Co-operative Association as its agent, for the sum of \$850, evidenced by two promissory notes, each signed by defendant, and one of which is the note in suit here. The answer further alleges:

“That the defendant, at the time of said purchase, and at the time of the execution of said notes, was and still is a farmer, engaged in farming and raising grain in the vicinity of Starkey, Union County, Or., and purchased said threshing machine and outfit for the express purpose of threshing his own, and others’ grain for a consideration, all of which plaintiff then well knew; that the plaintiff, being at the time of said sale to defendant a manufacturer and producer of threshing outfits, undertook and agreed to sell defendant said machinery, which was a threshing outfit, to thresh said grain, and as an inducement to defendant to purchase the same, sold said threshing outfit to defendant by description and under a representation and warranty by the plaintiff, at the time of so furnishing them, made to defendant, that said machinery was as represented, and would do good work when properly handled and adjusted, and that it was fit for the said purpose to which it was to be applied; that said threshing outfit was sold by plaintiff to defendant, and said notes were delivered upon the express intention and condition that this said warranty that the outfit would do good work was to operate as a condition that if it were not as warranted, it was not to be considered or in fact be a sale of same, and, further, the plaintiff, well knowing the character of the straw and grain which de-

defendant would desire, and need to thresh with said outfit, represented and warranted and stated to said defendant that said threshing outfit would answer all needs and purposes for which defendant would desire to put said threshing outfit; that it would do good work and thresh at least 500 bushels of wheat or 600 bushels of oats in a working day; that said threshing outfit would properly thresh wheat, oats and barley, and would properly clean and fan the grain, and would not throw or discharge any of the grain out of the machine with the straw, and would, in all respects, do good work and be a satisfactory machine to said defendant, and that it was not to be considered a sale if said machine failed to do good work; that said defendant thereafter accepted said threshing outfit on trial."

The answer sets forth the falsity of said representations, and states substantially that the machine was practically worthless for the purposes for which it was sold; that defendant notified plaintiff of the defects, and offered to return the machine, but plaintiff refused to receive it. There was a counterclaim for damages, but this was later eliminated by a ruling of the court.

All the new matter in the answer was put in issue by an appropriate reply. There was a verdict and judgment for defendant, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. John S. Hodgin*.

For respondent there was a brief over the names of *Mr. R. J. Green* and *Messrs. Cochran & Eberhard*, with oral arguments by *Mr. Green* and *Mr. Colon R. Eberhard*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1, 2. The gist of the defense in this case is that the association that sold the machine to defendant and to whom the note was given fraudulently misrepresented the machine to plaintiff, and thereby induced him to give his notes for a worthless machine. In our view of the case it makes no difference whether the seller was acting on its own responsibility or as agent for plaintiff, or whether the note was transferred with or without actual notice of the alleged fraud, or before or after it became due, for this reason: The note is non-negotiable. This was decided by us in the case of *Reynolds v. Vint*, 73 Or. 528 (144 Pac. 526); the note there in suit being practically identical with the one here. Being non-negotiable, the purchaser takes it subject to all the equities between the original parties: 8 Corpus Juris, p. 52, § 54, and notes. This being the law, the testimony in regard to agency was wholly irrelevant to any issue in the case, and the trial of that issue upon the whole gave the plaintiff a better case than that to which it was entitled. There was evidence sufficient to justify the court in submitting the question of the alleged deceit to the jury, and no error is directed against such ruling beyond those objections predicated upon the theory that it was necessary for defendant to prove that the Oregon Co-operative Association was the agent of plaintiff, which, as before stated, was unnecessary.

The judgment is affirmed.

AFFIRMED.

Argued November 1, affirmed December 12, 1916.

HODGES v. BLAYLOCK.

(161 Pac. 396.)

Bills and Notes—Liability for Attorney Fees—Demand of Payment.

1. Since the Negotiable Instruments Act (Sections 5903, 5905, 5906, 5907, 5911, L. O. L.), requiring a formal demand of payment of a note, expressly relates only to the demand necessary to charge an indorser or some other person secondarily liable, it follows from the maxim "*Expressio unius est exclusio alterius*," that any reasonable request to pay a demand note, containing a provision for the payment of attorney's fees, is sufficient to put the maker in default, if he fails to discharge his obligation.

[As to validity of stipulation in note for payment of attorney's fees, see note in 55 Am. St. Rep. 438.]

Bills and Notes—Demand for Payment—Waiver of Presentation.

2. The maker of a demand note waived its actual presentation upon a demand for payment by not asking for it, and by refusing payment on the ground that he did not then have the money and that he needed the amount to support his family.

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MOORE.

This is an action by John Hodges against S. E. Blaylock and Mrs. S. E. Blaylock, his wife, and is founded upon a promissory note, of which the following is a copy:

"\$638.75. Juntura, Oregon, June 25, 1915.

"On demand after date, without grace, we promise to pay to the order of John Hodges, at Juntura, Oregon, six hundred thirty-eight and 75/100 dollars in gold coin of the United States of America of the present standard value, with interest thereon in like gold coin at the rate of six per cent per annum from date until paid, for value received. Interest to be paid annually, and if not so paid the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note, and in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay

an additional sum, in like gold coin, as the court may adjudge reasonable, for attorney's fees to be allowed in said suit or action.

"S. E. BLAYLOCK.

"MRS. S. E. BLAYLOCK."

The complaint is in the usual form, and alleges that the plaintiff is the owner and holder of the note; that although payment thereof had been demanded from the defendants, they had not paid any part of it; and that \$75 is a reasonable sum as attorney's fees.

The answer admits the execution of the note, that plaintiff is the owner and holder thereof, and that no payment has been made thereon, but denies that prior to the commencement of this action any demand for the payment was made, or that \$75 or any other sum would be reasonable as attorney's fees. For a further defense it is alleged the defendants executed the note; that no demand for the payment thereof had been made upon either of the defendants who have at all times been ready, willing and able to pay the sum so due upon reasonable demand therefor, and that the only demand that has been made was the commencement of this action; that the defendants tender to the clerk of the court for plaintiff \$638.75, with interest at 6 per cent from June 25, 1915, in full payment to December 28, 1915, when the answer was filed.

The reply put in issue the allegations of new matter in the answer, and the cause, having been tried, resulted in a verdict and judgment for the amount due on the note, \$34.50 as attorney's fees, and the costs and disbursements of the action, and the defendants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Robert M. Duncan*.

For respondent there was a brief and an oral argument by *Mr. P. J. Gallagher*.

Opinion by MR. CHIEF JUSTICE MOORE.

It is contended that the note sued on provided for the payment of attorney's fees, or special damages, in case of default, which failure cannot arise until after a formal demand, which was never made, and hence an error was committed in giving a judgment for a greater sum than was deposited with the clerk. In support of the principle thus asserted, reliance is placed upon the case of *Prescott v. Grady*, 91 Cal. 518, 520 (27 Pac. 755), where it was ruled that in an action on a demand note, providing for the payment of a reasonable attorney's fee in case of suit thereon, the maker was not in default, as respects liability for special damages, until there had been a breach of the contract according to its terms, by failure to pay upon demand, and a denial that payment of the note was ever demanded raised a material issue as to such liability, which issue precluded a judgment upon the pleadings for an attorney's fee. The reason assigned for the rule insisted upon herein is practically an excerpt from the opinion in the case mentioned, where it is said:

"Appellant does not wish to open the well-settled question whether suit may be brought upon a note payable on demand without other demand than the bringing of the suit, but he claims that the contract sued on is more than a promissory note, that it contains a stipulation for special damage in case suit be brought, and that he ought not to be held to have incurred this liability until he is in default according to the terms of his contract; that is, until he has failed to pay on demand."

The testimony of the plaintiff is to the effect that about the 10th or 12th of July, 1915, and five months before this action was commenced, he met the defendant on the road near his home, which is about three miles from Juntura, Oregon, and asked him for the money and the defendant said he did not then have the money with which to pay the debt.

"Q. Did he promise he would pay it at any future time?

"A. He said I was young and single, and I didn't need the money at the present time, and he needed it to support his family on. * *

"Q. Did you have this note with you at the time you made the demand?

"A. No, sir."

The defendant S. E. Blaylock, as a witness in his own behalf, denied that any request was ever made for the payment of the money due on the promissory note until this action was commenced, when a copy of the complaint, containing a demand for judgment, was served upon him. P. J. Gallagher, the plaintiff's attorney, testified that he informed his client of the necessity of making a demand upon the defendant for the payment of the note before commencing an action thereon. Referring to the occasion of such advice, the witness further testified:

"Some time after that Mr. Blaylock, the defendant in this case, came into my office in Juntura, and we had a conversation relative to some other business matters that I was looking after for Mr. Hodges, and he at that time wanted to employ me to take care of his side of the case, and I told him that I could not at that time. In that conversation he made this statement to me: That Hodges was treating him unfair in the matter regarding their business transactions; that he had already made a demand on him for the amount due on this note—I think the note at that time was not

hardly a month old, I think; but the demand had been made, and Hodges wasn't treating him right, and he didn't think he would pay the note, and wasn't going to pay it."

Provisions of the Negotiable Instruments Act are relied upon as constituting the manner of making demand for the payment of the amount of the note, viz.:

"Presentment for payment is not necessary * * to charge the person primarily liable on the instrument; but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part; but except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers": Section 5903, L. O. L.

"Presentment for payment, to be sufficient, must be made (1) by the holder, or by some person authorized to receive payment on his behalf; (2) at a reasonable hour on a business day; (3) at a proper place, as herein defined; (4) to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made": Section 5905, L. O. L.

"Presentment for payment is made at the proper place (1) where a place of payment is specified in the instrument and it is there presented; (2) where no place of payment is specified, but the address of the person to make payment is given in the instrument, and it is there presented; (3) where no place of payment is specified and no address is given, and the instrument is presented at the usual place of business or residence of the person to make payment; (4) in any other case, if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence": Section 5906, L. O. L.

"The instrument must be exhibited to the person from whom payment is demanded, and when it is paid

must be delivered up to the party paying it": Section 5907, L. O. L.

"Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all": Section 5911, L. O. L.

1. If these statutory requirements must be observed, in order legally to demand from a maker the payment of a promissory note on which there is no indorser or other person secondarily liable, so as to entitle the holder to recover attorneys' fees provided for in the negotiable instrument, as special damages in case of default, it will be seen from the testimony referred to that there were failures to comply with the provisions of the enactment quoted. Since the formal demand so specified is required only in order to charge an indorser or some other person secondarily liable on a negotiable instrument, it must necessarily follow, from the maxim, "*Expressio unius est exclusio alterius*," that any reasonable request to pay a demand note, of the kind referred to, is sufficient to put the maker in default if he fails to discharge the obligation.

It will be remembered the plaintiff testified he did not have with him the promissory note when he demanded from Mr. Blaylock the payment thereof. A text-writer, in discussing this subject, remarks:

"To render a presentment for payment sufficient, the instrument must be exhibited to the person from whom payment is demanded. This rule has been stated as follows: 'No valid presentment and demand can be made by any person without having the note in his possession at the time, so that the maker may receive it in case he pays the amount due, unless special circumstances, such as the loss of the note or its destruction, are shown to excuse its absence.' The right of such person to an actual exhibition or production of the instrument may be waived by failing to

ask for it, and refusing payment on other grounds": Selover, Neg. Ins. (2 ed.), § 193.

In support of the last sentence repeated, the author cites the following cases: *Legg v. Vinal*, 165 Mass. 555 (43 N. E. 518); *Waring v. Betts*, 90 Va. 46 (17 S. E. 739, 44 Am. St. Rep. 890); *King v. Crowell*, 61 Me. 244 (14 Am. Rep. 560); *Lockwood v. Crawford*, 18 Conn. 361; *Gilpin v. Savage*, 60 Misc. Rep. 605 (112 N. Y. Supp. 802).

2. If, therefore, the note should have been presented in order to constitute a valid demand for its payment, and if the plaintiff's testimony is to be believed, which was for the jury to determine, the defendant S. E. Blaylock waived an exhibition of the negotiable instrument by not asking for it, and by refusing payment on the ground that he did not then have the money, and that he needed that sum with which to support his family.

No error was committed by the trial court, as alleged in several assignments not particularly referred to, and the judgment is affirmed. **AFFIRMED.**

Argued October 31, affirmed December 12, 1916.

MT. EMILY TIMBER CO. v. OREGON-WASHINGTON R. & N. CO.*

(161 Pac. 398.)

Railroads—Operation—Fires—Admissibility of Evidence.

1. In an action for damages caused by fire alleged to have been set by defendant's locomotive, the rule justifying the admission of evidence of other fires set by defendant's locomotives will not render admissible testimony that twelve days after the fire a witness saw

*The question of variance between allegations and proof as to time, in action against railroad company for setting out fires, is discussed in a note in 41 L. E. A. (N. S.) 635. **REPORTER.**

burned-over areas within the right of way; there being no testimony of the passing of engines at or immediately prior to the ignition of a fire.

Railroads—Operation—Fires—Instruction.

2. In an action for damages caused by fire alleged to have been set by defendant's locomotive, where the evidence did not suggest a deficiency in number of men, and did not bear on the incompetency of mechanics, machinists, fire patrol or laborers, an instruction withdrawing from the jury the consideration of allegations that defendant failed to employ competent or careful mechanics or machinists to repair its engines or to use careful or sufficient fire patrols, section-men or laborers to protect the right of way and adjacent land from fires, was properly given.

Trial—Operation of Railroads—Fires—Instructions.

3. In an action for damages caused by fire alleged to have been set by defendant's locomotive, an instruction complained of, taken with another given instruction, *held* to put the question of care required of defendant in procuring and utilizing appliances to prevent the escape of fire from its locomotives fairly before the jury and to enjoin the proper degree of care upon the defendant.

Railroads—Operation—Fires—Instruction.

4. As modern science and ingenuity have not yet reached a point of perfection or state where it is possible to propel steam locomotives in such manner as to absolutely prevent the escape of sparks of fire, the law does not require of a railroad company more than such reasonable care and diligence as the state of science will admit, nor make it liable for fires caused by the escape of ordinary and usual quantities of sparks while the engine is operated in the ordinary course of business by competent employees.

Railroads—Operation—Fires—Negligence.

5. In an action for damages caused by fire alleged to have been set by defendant's locomotive, although negligence may be inferred from circumstantial evidence, in order to establish negligence plaintiff must prove by a preponderance of evidence that the fire was communicated by sparks from defendant's locomotive, excluding every other theory as to the cause or origin of such fire.

Trial—Degree of Proof—Instructions.

6. Under Section 888, L. O. L., providing that the law does not require a degree of proof beyond moral certainty or that degree of proof which produces conviction in an unprejudiced mind, and Section 888, subdivision 5, making it the duty of the court to instruct that in civil cases the affirmative of the issue shall be proved, and the finding on contradictory evidence shall be according to the preponderance, in an action for damages for fire alleged to have been caused by defendant's locomotive, an instruction that the law does not require absolute proof or absolute certainty and is satisfied when a jury of unprejudiced minds, after hearing the testimony, have an abiding conviction of the truth of the claim, and that it is incumbent upon plaintiff to prove the same by a preponderance of competent evidence, was proper.

[As to presumption of negligence arising from communication of fire by railroad engine, see note in *Ann. Cas.* 1913E, 971.]

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is an action by the Mt. Emily Timber Company, a corporation, against the Oregon-Washington Railroad & Navigation Company, a corporation, to recover damages to timber and trees growing on plaintiff's land, caused by a fire alleged to have been occasioned by the negligence of defendant. The cause was tried to the court and jury and a verdict rendered in favor of defendant. From a resulting judgment, plaintiff appeals.

The particular allegations of negligence in the complaint are:

(1) That during the summer of 1914, and more especially on the twelfth day of August, 1914, the defendant neglected and failed to keep its said right of way through said sections (21 and 22) free and clear of dry grass, weeds and other vegetation, trash, debris and combustible material, but wrongfully and negligently allowed the grass, weeds and other vegetation to grow, mature and dry and accumulate with other debris, trash and combustible materials upon said right of way in sections 21 and 22, in large quantities, thereby rendering and making the same subject and liable to be set on fire by sparks, cinders and brands from defendant's engines, locomotives, cars and trains passing through said sections, and thereby communicating such fires to the adjacent lands and timber.

(2) That during said summer of 1914, and more especially on or about the twelfth day of August, 1914, the defendant failed, neglected and omitted to provide its engines, locomotives, cars and trains with effective, sufficient or suitable netting, spark-arresters, mechanism, fire and draft apparatus, so as to prevent sparks, cinders and brands from being blown and forced from such engines, locomotives, cars and trains at, upon and over said right of way and the adjacent lands thereto,

or to keep the same in an effective state of repair during said time.

(3) That the defendant, during said times, and more especially on or about the twelfth day of August, 1914, omitted, neglected and failed to employ and place in charge of said engines, locomotives, cars and trains competent, careful or suitable engineers, firemen or trainmen.

(4) Or to employ competent or careful mechanics or machinists to properly overhaul and keep in an effective state of repair said engines, locomotives, cars and trains, or the fire apparatus, spark-arrester, netting and drafts thereon.

(5) Or to employ and use careful, competent or sufficient fire patrol, sectionmen and laborers upon said railroad track and right of way, so to keep such right of way free and clear of grass, weeds and other vegetation, debris, trash and combustible materials.

Defendant denied any negligence on its part, and pleaded that at or about the time the fire broke out train extra 507 west passed that point, and that no other train had passed there for two hours or more before that; that this train was pulled by two engines of first-class construction properly maintained, in good condition and repair, and each equipped with suitable and proper spark-arresting devices, including proper and suitable mechanism, netting and fire and draft apparatus, all of which appliances were continuously during the time in a proper condition and repair; that the train was operated along the track and right of way in the usual and customary course of the railroad company's business; that due and reasonable care was used by the defendant in acquiring, keeping, maintaining and equipping its locomotives and all the parts thereof in a safe, suitable and secure condition for the prevention of the escape of fire therefrom and to properly and skillfully operate them.

The reply put in issue the most of the defendant's answer.

The evidence introduced tended to show the case as made by plaintiff substantially as follows: During all the times involved in this controversy plaintiff was the owner of a large tract consisting of several thousand acres of mountain timber lands, a portion of which is located in sections 21 and 22, township 2 south, range 36 east, Willamette Meridian. The defendant owns a right of way for its railroad which passes through the sections named and adjoins the plaintiff's premises. The lands and right of way involved are located on the eastern slope of the Blue Mountains, between Hilgard and Kamela, a distance of approximately four miles west of the former place, to what is known as the lower or eastern end of Glover Siding. The distance between the beginning of the siding and Glover Station, the upper point, is about three fourths of a mile and extends up a steep grade climbing the mountain in a westerly direction to the Glover Section-house. On August 12, 1914, a fire occurred along or near the defendant's right of way, and the testimony tends to show that at the lower point, known as the siding, a fire either started within the right of way and burned out to the lands of the plaintiff, or from the outside burned to and within the right of way a distance of perhaps 25 feet. At the upper point, also, a fire started at or about the same time either within the right of way or just outside, and burned a distance of 25 feet within the right of way. The tracks of each of the fires widened out as they passed out of the right of way, and after getting out on to the lands of the plaintiff converged together into one large fire that spread out and burned over approximately 2,000 acres of timber and brush lands, much of which had been

logged off, causing damage as claimed by the plaintiff to the extent of about \$10,000. The fire, according to the testimony, started somewhere between 10 and 12:30 o'clock, either on the defendant's right of way or in the immediate vicinity thereof, and in a very short time thereafter was beyond control. The day was dry and hot. The locality where the fire originated was a steep grade. The right of way was covered with a heavy growth of dry grass which had not been mowed or cleared off during the year 1914. The day of the fire thirteen locomotives of the defendant company passed over the track and along the points where the fire occurred. Two heavy freight trains, each being hauled by two engines, passed upgrade in a westerly direction along the fire line. One of them, extra freight No. 507, drawn by engines 507 and 700, passed through the siding going west at about 11 o'clock A. M., and consisted of 51 freight-cars. Engine 507 was at the head of the train, and engine 700, known as the "helper," was located 14 cars from the rear. No. 23, another freight train, passed over the line at about 12:30 o'clock going west and upgrade at the points where the fire occurred. It was drawn by two engines, Nos. 511 and 702, and consisted of a train of 40 cars. Other locomotives that passed the point in controversy during the day hauled the passenger trains or were engines passing back and forth as helpers of other trains. The two helper engines, 700, which hauled extra freight train 507, and engine 702, which hauled freight train No. 23 west, had not been inspected during the month of August, except once, on the 20th and 25th, respectively. No record appears of any prior inspection of either locomotive. No. 17, a passenger train, passed the place in controversy going upgrade at 9:30

or 9:35 A. M. on the 14th, and was drawn by locomotive No. 210.

The testimony shows that this locomotive was inspected on August 15th, and the spark-arrester and basket were found to be out of repair and defective. The large helper engines, 700 and 702, which drew the freight trains westward on that day, both contained wire netting known as 2½ by 2½, while the other engines were supplied with spark-arrester and wire netting of a finer grade and known as 4x4 netting. About 12 days after the fire, Mr. J. T. Williamson visited the scene and inspected the premises. The testimony offered tends to show that for several feet outside the right of way at both the lower and upper points described and all along the line upgrade between the two, the right of way and the adjacent grounds of the plaintiff were thickly sprinkled with coal cinders varying from dust up to the size of a man's finger-nail. Some of these cinders were old and others new and fresh. Between the lower and the upper points along the siding, nine separate fires had occurred within the right of way of the defendant. At the trial in making its case in chief plaintiff was compelled to rely upon circumstantial evidence to establish its case, as the place where the fire broke out is located in the Blue Mountains at rather a remote spot. **AFFIRMED.**

For appellant there was a brief with oral arguments by *Mr. James H. Raley* and *Mr. John S. Hodgin*.

For respondent there was a brief over the names of *Mr. Charles E. Cochran*, *Mr. William W. Cotton* and *Messrs. Crawford & Eakin*, with an oral argument by *Mr. Cochran*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. The plaintiff makes eight assignments of error. The first is the exclusion from consideration by the jury of certain evidence of other fires upon the defendant's right of way in that locality and rejection of evidence of the same purport. Exceptions were saved to seven instructions given to the jury. Mr. Williamson, manager of the timber company, testified in part on behalf of plaintiff as follows:

"It is a north slope all along there inside of the right of way and in the pine grass along these cuts between the block signal station, between the siding and Glover Section-house, I found where there has been nine fires started fresh; all appeared to be, might have been, at the same time, and two had been some time before. I will say that every fire I found—some of them had only burned, just were fires in the grass inside the right of way, and inside the fence and to the best of my knowledge within a hundred feet."

Counsel for defendant moved the court to take this evidence from the jury. The court ruled that the motion should be allowed unless it should be shown that an engine of defendant passed along just prior to the fires being set out. The discovery of these other fires was made by the manager of the plaintiff some 10 or 12 days after the fire of which complaint is made. By instruction 12, the court charged the jury in effect that the mere presence along the right of way of small burned-over areas was not a circumstance justifying any inference of liability of negligence on the part of defendant. These rulings constitute two of the assignments of error which we will consider together. There was no evidence tending to show that any of the defendant's engines passed this point prior to the other fires mentioned by Mr. Williamson or to connect

their origin with the company's engines. The rule justifying the admission of evidence of other fires set by defendant's engines does not admit testimony to the effect that 12 days or so after the fire a witness saw burned-over areas within the right of way; there being no testimony of the passing of engines at or immediately prior to the ignition of a fire: *Hawley v. Sumpter Ry. Co.*, 49 Or. 509, 519 (90 Pac. 1106, 12 L. R. A. (N. S.) 526); *Taffe v. Oregon R. & N. Co.*, 60 Or. 177, 180 (117 Pac. 989); 67 Am. & Eng. R. R. Cas. (N. S.) 130; *La Salle v. Central R. R. of Oregon*, 73 Or. 203 (144 Pac. 414). Evidence of other fires is admissible only by showing the same to have seasonably followed in the wake of an engine from whose stack sparks were being emitted: *Koontz v. Oregon R. & N. Co.*, 20 Or. 3, 16 (23 Pac. 820); *Hartford Ins. Co. v. Central R. R. of Oregon*, 74 Or. 144, 149 (144 Pac. 417). In *Hawley v. Sumpter Ry. Co.*, 49 Or. 509 (90 Pac. 1106, 12 L. R. A. (N. S.) 526), two witnesses deposed over objections that they had seen other fires along defendant's right of way, but there was no evidence tending to show the origin of the fires or that the defendant was in any way responsible for them. At page 520 of 49 Or. (page 1110 of 90 Pac. [12 L. R. A. (N. S.) 526]), the court ruled as follows:

"The plaintiff having failed to offer in connection with the testimony of these two witnesses, to which objection was made, any testimony tending to connect, either directly or remotely, any of the fires mentioned by them with the operation of the road by defendant, such testimony was not admissible. * * "

The ruling of the court in these respects was in conformity with the settled law.

2. Error is predicated upon instructions Nos. 10 and 11, whereby the jury were told that they should not

consider the allegation that defendant failed to employ competent or careful mechanics or machinists to keep in a state of repair its engines, or use careful, competent or sufficient fire patrols, sectionmen or laborers, to protect the right of way or adjacent land from fire. By the bill of exceptions the trial judge certified the following statement:

“There was no testimony relating to the competency of the enginemen, firemen and trainmen. Neither was there any testimony introduced tending to show that the defendant failed to employ competent or careful mechanics or machinists to properly overhaul its engines, locomotives, cars or trains, or any part thereof. Nor was there any testimony offered that the defendant failed and neglected to employ or use careful or sufficient fire patrols, sectionmen or laborers, whereby to protect the right of way.”

It is contended by plaintiff that the testimony that defendant's right of way was covered with a growth of grass, weeds and debris was in itself evidence tending to show that defendant had not had competent laborers upon it. In order to fully understand these instructions it is necessary to notice the other parts of the charge.

The trial court charged the jury as follows:

No. 2. “I instruct you that if you find from the evidence in this case that the property alleged in the complaint, or any part thereof, was destroyed by fire communicated to it from an engine, or engines, of the defendant railroad company, and in the manner and at the place named in the complaint, the fact that such property was so destroyed raises a presumption of negligence on the part of the defendant company, either in the construction, management or operation of the engine or engines from which the fire was so communicated or in the exercise of proper care of its right of way, and casts upon the defendant railroad

company the burden of proof of overcoming such presumption of negligence by evidence which you believe to be true."

No. 3. "I instruct you that it was the duty of the defendant railroad company to exercise reasonable diligence, care and precaution in procuring and utilizing, and keeping in good repair, the most approved mechanical inventions and apparatus to prevent the escape of fire, coals, sparks and live cinders; and if from the evidence in this case you find that the defendant railroad company did not exercise such reasonable diligence, care and precaution in producing and utilizing and keeping in repair the most approved mechanical inventions and apparatus to prevent the escape of fire, coals, sparks and live cinders, and that by reason thereof plaintiff's property was destroyed in the manner alleged in its complaint, then your verdict should be for the plaintiff. * * "

No. 4. "I instruct you that it is the duty of the defendant railroad company to exercise reasonable care, precaution and skill in the operation, handling and management of its engine or engines, and if you find from the evidence in this case that the defendant railroad company did not use such care, precaution and skill, and by reason thereof the plaintiff's property was destroyed by fire in the manner alleged in the complaint, then your verdict should be for the plaintiff. * * "

No. 6. "I instruct you that if you further find that the right of way of the defendant had not been mowed during the period from the first day of June, 1914, to the first day of July, 1914, at the point where the fire started, and that the fire was started by sparks from the engine or engines of the defendant thrown upon such unmowed grass or weeds upon such right of way, then such presumption of negligence is conclusive and cannot be overcome by evidence, and your verdict must be for the plaintiff. If, however, you should find from the evidence in this case that the right of way had been mowed between the first day of June, 1914, and the first day of July, 1914, and you should further find that the

fire was started by sparks from the defendant's engine or engines at some point on defendant's right of way that had been mowed between the first day of June, 1914, and the first day of July, 1914, then such presumption of negligence is not conclusive, but may be overcome by evidence which you believe that the defendant was not negligent in any of the respects charged in the complaint relating to the equipment. * * ,

See Section 6984, L. O. L.

It will therefore be seen that, whether the railroad company employed 5 or 500 sectionmen on this section, the matter of keeping the right of way free from grass and debris was fairly submitted to the jury, and so, also, was the question of the care and management of the defendant's engines. The two instructions complained of relate to the competency and skill of the employees. The evidence did not suggest that there was a deficiency in the number of men employed for those purposes, and the bill of exceptions discloses no evidence bearing upon the competency of the mechanics or machinists or concerning fire patrols or laborers. In order to direct the jury in the consideration of the issues, it was proper for the court to withdraw from them certain charges of negligence assigned in the complaint as a ground of recovery when requested to do so, when the same was not supported by the evidence. Otherwise, in case of a verdict in favor of plaintiff, it would have been impossible to know but that the complaint had been remembered by the jury as evidence and a verdict based upon the claim of negligence in those respects, when there was no evidence to support it: *Chicago, St. P., M. & O. Ry. Co. v. Kroloff*, 217 Fed. 525, 528 (133 C. C. A. 377). While it is a difficult and delicate matter for the trial court to bear in mind all the evidence during the trial of a cause so as to be able

to so instruct, we are not referred to any competent testimony supporting the issues which was not submitted to the jury and find no error in the ruling. Evidently the jury may have found that the right of way was not kept free from grass and debris, but that the fire did not originate upon such right of way, thus eliminating the question of care in this respect. Of course, the defendant would not be liable for a want of care unless an injury resulted therefrom. The essential facts for the consideration of the jury in regard to the care and condition of the engines of defendant were whether or not the railroad company had exercised reasonable care in procuring and utilizing the most modern inventions, apparatus and appliances to prevent the escape of fire and to properly inspect and maintain the same in good condition. By instruction No. 3, above quoted, the jury were told in effect that if they found there had been a lack of such care and precaution on the part of the railroad company, and that by reason thereof plaintiff's property was destroyed by fire, they should find a verdict for plaintiff. In other words, the jury was informed in substance that even though the employees of defendant were competent, if there was negligence in the matters detailed and injury ensued, the defendant would be liable. The instruction given requires servants of the defendant to exercise their ability, and it fairly submitted to the jury the matter of equipping, maintaining and managing the engines of defendant.

3. Plaintiff complains of instruction No. 13, which is as follows:

"I further instruct you that it is the duty of the defendant to exercise reasonable diligence, care and precaution in procuring and in utilizing the most approved mechanical inventions, apparatus and appliances to

prevent the escape of fire, coals and sparks, and to exercise reasonable care by appropriate inspection and repair to maintain such appliances in good condition. Now, if you find from the evidence that the defendant has used reasonable care and exercised reasonable diligence and precaution in obtaining and putting into practical use such appliances and to maintain them as such, then it has fully discharged its legal duty to all those subject to the danger incident to the escape of fire, and even if a fire shall occur therefrom, notwithstanding the defendant has used such care, diligence and precaution, then it will be your bounden duty to return a verdict for the defendant."

This part of the charge, taken together with instruction No. 3, puts the question fairly before the jury and enjoins the proper degree of care upon the railroad company: *Anderson v. Oregon R. R. Co.*, 45 Or. 215 (77 Pac. 119); *La Salle v. Central R. of Oregon*, 73 Or. 203, 211 (144 Pac. 414); *Lesser Cotton Co. v. St. Louis etc. Ry. Co.*, 114 Fed. 133, 141, 52 C. C. A. 95.

4. Instruction No. 14 is challenged. It reads thus:

"Now, the jury will note that modern science and ingenuity have not yet reached a point where it is possible to propel steam locomotives in such a manner as to absolutely prevent the emission of sparks or fire in their operation. The law does not require that locomotive engines used in the manner the defendant uses the same shall be so constructed, equipped or managed so that no sparks of fire shall escape from them, and so if sparks shall be emitted from the locomotives in ordinary and usual quantities, that is to say, such quantities as naturally would be emitted from an engine upon which the railroad company shall have used reasonable care, diligence and precaution in equipping with modern and approved spark-arresting devices, and shall have operated in its usual course of business by competent employees, and a fire occurs from such sparks, the defendant will not be liable."

We approve this instruction. The law does not require of a railroad company care beyond that which the state of the art and the progress of invention and science will admit. Modern science and ingenuity have not yet reached a point of perfection or a state where it is possible to manage or propel steam locomotives in such manner as to absolutely prevent the escape of sparks of fire: *Spaulding v. Chicago & N. Ry. Co.*, 30 Wis. 110, 125 (11 Am. Rep. 550); *Menomone River Sash & Door Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447 (65 N. W. 176, 179); *Gainesville etc. R. Co. v. Edmondson*, 101 Ga. 747 (29 S. E. 213). In *Chenoweth v. Southern Pac. Co.*, 53 Or. 111, 119 (99 Pac. 86, 89), this court said:

“Evidence that the engine, just prior or subsequent to the fire, scattered sparks, is not sufficient to impute negligence. It is only when emitting them in unusual quantities or of unusual size that it has that effect.”

5. Instruction No. 16 is excepted to and is of the following purport: That the plaintiff could prove liability against the defendant for the consequence of the fire in question by circumstantial evidence from which the jury could reasonably infer negligence; that the facts and circumstances established to the satisfaction of the jury by the preponderance of the evidence must not only be sufficient to justify an inference of negligence, but must exclude every other theory as to the cause or origin of such fire. The instruction embodies the law of circumstantial evidence, and the purport thereof is to require the fact to be proved by a preponderance of the evidence; that is, if the facts and circumstances show two ways or conditions to exist as a result of which the railroad company would be liable, and also three other ways or conditions for which the railroad would not be liable, then the jury was charged that the

evidence must preponderate in favor of one or more of the conditions for which the railroad would be liable. This charge was necessary in order to prevent the jury from speculating that the fire occurred on account of some negligent act of defendant when the evidence, according to their belief, might just as strongly have showed that it happened in some other manner. In 13 Am. & Eng. Ency. Law (2 ed.), p. 512, the rule is stated:

“It must be obvious that evidence that the fire in question merely might have originated from the defendant’s engines, or even proof tending to show that it did, is not entitled to much weight, unless the possibility of origin from other sources is excluded.”

In order to establish a charge of negligence on the part of the railroad company, it is not enough for plaintiff to show a possibility or even a probability that the fire was communicated to the property by sparks from its locomotives, but it must prove by a preponderance of affirmative evidence that it did so originate: 33 Cyc. 1367. Plaintiff argues that this part of the charge requires proof beyond a reasonable doubt. This contention is not in accord with our views. The instruction complained of is not subject to the criticisms made by the plaintiff.

6. Again, complaint is made of instruction No. 17, by which the court charged the jury that the law does not require absolute proof or absolute certainty, and is satisfied when a jury of unprejudiced minds, after hearing the testimony, have an abiding conviction of the truth of the claim; that it is incumbent upon the plaintiff to prove the same by competent evidence whereby from a preponderance thereof they are satisfied that the claim has been established: *Minnesota*

Sash & Door Co. v. Great Northern Ry. Co., 83 Minn. 370 (86 N. W. 451, 454); *Gibbons v. Wisconsin Valley R. Co.*, 58 Wis. 335 (17 N. W. 132); *Gracy v. Atlantic Coast Line R. Co.*, 53 Fla. 350 (42 South. 903, 908); *Brown v. Atlantic & Air Line Ry. Co.*, 13 Am. & Eng. R. R. Cas. 479, 483. The information thereby imparted to the jury was in accordance with the statute.

Section 688, L. O. L., declares the standard of certainty in respect to civil cases, as follows:

“The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.”

Section 868, subdivision 5, L. O. L., makes it the duty of the court to instruct on all proper occasions that in civil cases the affirmative of the issue shall be proved, and, when the evidence is contradictory, the finding shall be according to the preponderance of the evidence. As we understand the record, it was the theory of the plaintiff that the fire complained of originated upon the railroad company's right of way and was occasioned by the negligence of the defendant. The theory of the defendant seems to have been that the fire did not originate upon defendant's right of way and was not caused elsewhere by the negligence of the defendant.

A careful examination of the whole charge given by the trial court to the jury leads us to believe that the disputed questions of fact were fairly submitted to the jury. We have nothing to do with the weight of the evidence. It is the special province of the jury to pass upon questions involving that question. The jury

found in favor of the defendant, and the judgment based thereon must be upheld.

Finding no error in the record, the judgment of the lower court is affirmed. **AFFIRMED.**

Submitted on briefs November 1, affirmed December 12, 1916.

HILL v. AMERICAN LAND & LIVESTOCK CO.*

(161 Pac. 408.)

Waters and Watercourses—Appropriation for Irrigation—Desert Land Act.

1. Under the Desert Land Act, Act Cong. March 3, 1877, c. 107 (19 Stat. 377, U. S. Comp. Stats. 1901, p. 1548), which provides that all surplus water over and above the actual appropriation and use for reclamation of desert land under the act, "together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation," etc., subject to existing rights, a defendant, whose title was derived from patent from the United States government by virtue of a homestead entry, and who had made no appropriation of water from a stream upon which his land had bordered since 1877, could not, by reason of the mere abuttal upon the stream, defeat or diminish a prior appropriation made under the act.

Waters and Watercourses—Appropriation for Irrigation—Evidence—Sufficiency.

2. In a proceeding to determine riparian rights, evidence held to support a finding that a defendant had never, by ditches or otherwise, used or appropriated water for irrigation purposes from an abutting stream, except seepage water escaping from another irrigation system.

[As to what constitutes appropriation of water, see note in 60 Am. St. Rep. 799.]

Waters and Watercourses—Appropriation for Irrigation—Right to Use of Waste Water.

3. It being the duty of an appropriator of water for irrigation to use ordinary methods to prevent waste, while a temporary use may be made of seepage water, allowed to escape by excessive use of water, by anyone who may capture it, no permanent right can be acquired to compel the continuance of the discharge or loss.

*On right at common law of prior appropriators of water, see comprehensive note in 30 L. R. A. 668. **REPORTER.**

**Waters and Watercourses—Appropriation for Irrigation Proceedings
—Pleading—Misjoinder of Parties Plaintiff.**

4. Under Section 393, L. O. L., providing that "all persons having an interest in the subject of a suit, and in obtaining the relief demanded, may be joined as plaintiffs, except as * * otherwise provided"; and that "any person may be made a defendant who has or claims an interest * * adverse to the plaintiff, or who is a necessary party to a complete determination * * of the questions involved," in a proceeding to determine riparian rights to water for irrigation purposes, the thing in controversy being the whole mobile flowage of the stream, and no adequate determination being possible without the presence of all interested in the entire flowage, the joinder of a plaintiff who claimed riparian rights on the stream was proper.

From Harney: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is a suit by Edwin B. Hill, Charlotte E. Sturgeon, Rose E. Doan, Melvin Doan, John McLain, Fred Allen, E. J. Catlow, E. M. Schroeder, Dave Defenbaugh, Frank Adrian, John Beatty, Mary Beatty and Carl A. Thomsen, against the American Land & Livestock Co., a corporation, C. E. Thomas and — Walter, a partnership doing business as Thomas & Walter, John Polander, C. S. Allgard, H. J. Bamford, A. W. Quincy, J. E. Rounsevelle, Sarah K. Wiggins, Michael J. Woods, Joseph Kralik, Blanche Lyndall, E. J. Dean, G. Henry Gils, W. S. Estell, Cornelius Mandeville, Norman J. Ross, Harry Slough, Oscar Christopher-son, S. Waterfall, William J. Kennedy, Lydia E. Fryer, Hubert Wynhoff, P. E. Carlton, E. A. Homes, Henrietta C. Bates, Hilding Ryden, George H. Miller, Gustave O. Schreiber, F. L. Whelply, Mary J. Wulstein, William Kent, William T. Styles, Clarence F. Clark, F. E. Pepper, Arnold E. Archibald, Lawrence Clark, Velda M. Beal, Robert Scott, and Pacific Livestock Company, a corporation, to adjudicate the rights of the various parties to the use of the waters of Trout Creek, in Harney County, Oregon. The plaintiffs describe their realty holdings, the several amounts of

their appropriations of water, and the use to which they have put it. Concerning the defendants, after reciting the corporate character of some of them and the existence of the partnership of two others, the complaint states that they—

“and each and every one claims an interest in and rights to the waters of said Trout Creek, but that the rights of each and every one of the said defendants, except as herein otherwise stated, are inferior to and subject to the rights of the plaintiffs as herein alleged, and that each and every one of the said parties defendant are necessary parties to this suit, in order to obtain a final determination of the subject matter thereof.”

The prayer is for a decree, determining the relative rights and priorities of the parties to the waters mentioned. The Pacific Livestock Company, one of the defendants, and the only party appealing from the decree, answered, denying all the allegations of the complaint. After averring its ownership of 160.26 acres of land, its answer proceeds as follows:

“That Trout Creek flows, and from time immemorial has flowed, through, over and upon these said lands, and which said lands are riparian thereto, and riparian rights attached thereto, and the said defendant is entitled to have the water of said creek flow by, through, over, and upon the said lands, and to make such use of said water as a riparian owner is entitled to make thereof. That in the year 1889 the said defendant, its predecessors and grantors, entered into and upon the said creek by means of ditches, dams and other works, and took and appropriated from the said stream to and upon the lands aforesaid 40 miner’s inches of water measured under a 4-inch pressure, and applied the same to the irrigation of said lands, the watering of stock, and other beneficial uses, and ever since said time said defendant and its predecessors and grantors have continuously, uninterruptedly under a claim of right, adversely to the said plaintiffs and the defend-

ants herein and to all the world, taken, appropriated, diverted and used the said water, and the whole thereof, and all of the same has been, and still is being, applied to beneficial uses, and defendant is now the owner of the right to take, appropriate and use the amount of water aforesaid. As a further defense to the said suit, the said defendant alleges that there is a misjoinder of causes of action in said suit, in that each of the plaintiffs herein as an appropriator of said water has a distinct and separate right of property not owned in common or jointly, with the other plaintiffs, and each of said plaintiffs has a separate cause of action to protect the said property, and the said causes of action cannot be joined, and the same are improperly joined in said suit."

This in turn was denied by the reply. After a full hearing on the issues the court, among others, made the following finding of fact:

"That one John Porter made homestead entry of the east half southwest quarter and lot 4, section 18, township 39 south, range 37 east, W. M., containing 160.26 acres, for which he obtained patent from the United States in June, 1891, and by mesne conveyances the Pacific Livestock Company, a corporation, one of the defendants herein, acquired title thereto. It appears from the evidence that no ditch was ever taken from Trout Creek, and that no water is used from that stream for the irrigation of this ranch, except seepage water that arises on or near the place, from the irrigation of Frank Adrian's place. That from such seepage water about 25 acres on the north side of Trout Creek is irrigated, and about 15 acres on the south side of the creek. No appropriation from Trout Creek can be made for this land, for the reason that the water used is seepage water. Nothing should be construed here, however, as preventing the company from making use of the seepage water from the Adrian place."

Thereupon the court entered a decree, declaring the rights of the other parties to the suit, without mention of the Pacific Livestock Company. As to that defendant the only feature of the decree otherwise affecting it is this last clause thereof:

"The temporary injunction heretofore granted in this case is hereby dissolved, and each and every party to this suit and those claiming by, through, or under them are hereby enjoined from using the water of any of the streams, the rights of which have been herein determined, in any manner or amount contrary to the provisions of this decree."

Only the Pacific Livestock Company appeals.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief over the names of *Mr. Edward F. Treadwell* and *Mr. John L. Rand*.

For respondents there was a brief over the names of *Mr. J. W. Biggs*, *Mr. Gustav A. Rembold*, *Mr. P. J. Gallagher*, *Messrs. McColloch & Wood*, *Mr. A. W. Gowan*, *Mr. John S. Cook* and *Mr. Charles W. Ellis*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The testimony shows that the Pacific Livestock Company, for convenience called the defendant, de-raigned title from one John Porter, who in turn had it from the United States government by virtue of homestead entry, which was made by him on April 23, 1888, resulting in a patent dated June 13, 1891. This renders it subject to the act of Congress of March 3, 1877, commonly known as the "Desert Land Act,"

which provided that all surplus water over and above the actual appropriation and use for reclamation of desert land under the act, "together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights * * ": Act Cong. 1877, c. 107 (19 Stat. U. S. 377, 6 Fed. Stats. Ann. 392, U. S. Comp. Stats. 1901, p. 1548). This provision is thus construed by this court in *Hough v. Porter*, 51 Or. 318, 404 (98 Pac. 1083, at 1097):

"The language used in this act was clearly intended to change the rule respecting the right of riparians to the use of water for irrigation, mining and power purposes; but, as in the last case cited, it has its limits. It does not go so far as to affect the rights originally giving rise to the doctrine of riparian rights; that is, for domestic use, including the watering of domestic animals and such stock as may be essential to the sustenance of the owners of lands adjacent to the streams or other bodies of water."

Thus it is made plain that riparian rights are not the same in essential particulars as the common-law privilege thus designated. In the arid and semi-arid regions of the west the principal thing is the beneficial use of water as contrasted with its mere presence under the old common-law doctrine that a person whose lands abutted upon a stream was entitled to have it flow past his premises as it was naturally wont to do undiminished in quantity except for domestic purposes and unimpaired in quality. The rule had its rise in England, where irrigation was at the time practically unknown. The modification embodied in the act of Congress referred to and in the general legislation of the semi-arid western states is founded upon the neces-

sity of the situation and the principle of making the water do the greatest good to the greatest number. It may well be doubted, therefore, whether the allegation of the defendant's answer, to the effect that riparian rights attach to its lands by virtue of the creek running through it, is more than a conclusion of law, or presents any obstacle to the prior appropriation of other parties taking advantage of the reservation annexed by the government to its lands, permitting its appropriation by the first comer of the waters flowing thereon. If other persons, operating under the Desert Land Act had previously appropriated all the water of the stream, it seems that the riparian rights as known at common law, attaching to the land in question in favor of a subsequent taker, would be negligible. Because public land since 1877 bordered a stream, it does not necessarily follow that one holding it by subsequent title can defeat or diminish a prior appropriation made under the act. To work out such a result something more must be shown than mere abuttal upon the stream bed.

2. All the testimony affecting the defendant appears in the abstract. John C. Beatty, a foreman for many years for the defendant, testified that the only water that goes upon the land in question is seepage water from the Frank Adrian place next above it on the stream. He says that a successor of his plowed some in an old ditch on the defendant's land, but that he never saw any water in it. It seems it was not connected directly or indirectly with Trout Creek. He is clear in his statement that the only water going upon the place, aside from the stream, is seepage from the place above, and that the only use to which the property in question was put was for pasturage, or to hold cattle there three or four or five days during the rodeo.

There is utterly no testimony to support the allegation that the defendant entered upon the creek and by means of ditches, dams and other works appropriated water therefrom. The finding of fact quoted is amply supported by the testimony.

3. The complaint of the defendant is that in prescribing the amount of water which Adrian was entitled to use, no provision was made for continuing the seepage upon which the defendant depends for moisture upon its land. The principle governing such a case is thus enunciated in 2 Kinney, Irrigation and Water Rights (2 ed.), Section 1115:

“In a previous chapter upon the subject of the economic use and the suppression of waste we endeavored to show that in all enterprises for the use of water there is more or less of the water lost to the appropriators from what is called necessary waste. This is the water which escapes from the ditches, canals or other works, and which cannot be avoided by the ordinary precautions commonly used in the construction of the works. And while it is the duty of the appropriator to use ordinary methods to prevent this waste, he is not compelled, under the law, to use extraordinary methods. However, as ‘water is a movable, wandering thing,’ under the best methods known to man, some of the water will escape. To this necessarily lost water, while a temporary use may be made of it by anyone who may capture it, no permanent right can be acquired so as to compel the continuance of the discharge or loss.”

The modern doctrine in the western states is that no person has a right to use more water under his appropriation than can be beneficially applied to some useful purpose. If, therefore, Adrian violated this rule by his excessive use of the water, he had no title to the surplus, and neither could the defendant acquire any ownership therein. The latter would be in no

better position than the receiver of stolen goods. It cannot call upon the court to compel Adrian to continue in his wrongful and prodigal use of the water so that the defendant may be benefited by the resulting seepage. The allusion to seepage in the finding of the court already quoted manifestly refers to that unavoidable escape of water referred to in the excerpt from the writings of Kinney. The evidence does not disclose any impairment of riparian rights as modified by the Desert Land Act. Under the finding of fact the decree might have been made more specifically stringent upon the defendant. Its rights were not prejudiced by the conclusion of the court.

4. It was also charged by the answer that there was a misjoinder of causes of action in that each appropriator was an owner in severalty, and could not join with others in this class of litigation; but that point has been adversely determined by this court in applying Section 393, L. O. L., reading thus:

“All persons having an interest in the subject of the suit, and in obtaining the relief demanded, may be joined as plaintiffs, except as in this title otherwise provided. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein.”

The rule is established in the following precedents: *Williams v. Altnow*, 51 Or. 275 (95 Pac. 200, 97 Pac. 539); *Hough v. Porter*, 51 Or. 318, 404 (98 Pac. 1083, 1097); *Whited v. Cavin*, 55 Or. 98 (105 Pac. 396); *Lockhart v. Ferrey*, 59 Or. 179 (115 Pac. 431). The thing in controversy is the whole mobile flowage of the stream. At the outset, under the very nature of things, no one can tell what particular drop of water is his own. It is the use of an aliquot part of this

amount which is in question; and no adequate determination of the same can be had without the presence of all who are interested in the entire flowage of the stream. Error is not apparent in the decree. It is affirmed.

AFFIRMED.

Argued June 2, affirmed December 12, 1916.

STATE v. FARNAM.*

(161 Pac. 417.)

Indictment and Information—Homicide—Included Offenses.

1. The general rule is that an indictment for murder in the first degree necessarily involves all other grades of homicide which the evidence tends to establish.

[As to indictment or information for homicide, see note in 3 Am. St. Rep. 279.]

Abortion—Elements.

2. Procuring an unlawful abortion upon any woman always involves an assault in law, even when it is done with her consent and connivance, because no one can consent to an unlawful act.

Homicide—Statute—Abortion.

3. The Oregon statute, making homicide from unlawful abortion manslaughter, has not created a new crime, but merely reduced the grade of the offense at common law by changing the punishment from death to imprisonment in the penitentiary.

Homicide—Indictment—Abortion.

4. An indictment for murder in the first degree is sufficient to sustain a conviction for homicide, committed in an attempt to procure an abortion.

Homicide—Indictment—Unknown Means.

5. An indictment for murder by means unknown to the grand jury is good.

Homicide—Indictment—Proof and Variance.

6. An indictment for murder by means unknown to the grand jury will sustain conviction in a case where accused was conclusively

*On admissibility of declarations of one upon whom an abortion has been committed against others charged with complicity therein, see notes in 35 L. R. A. (N. S.) 1084; L. R. A. 1916C, 570.

On homicide in commission of or attempt to commit abortion, see notes in 63 L. R. A. 902; 49 L. R. A. (N. S.) 590. REPORTER.

proved to have either murdered a girl outright or killed her in an attempt to procure an abortion.

Homicide—Harmless Error.

7. Where it appeared that accused either killed a girl outright or in an attempt to procure an abortion, but there was no evidence that an operation was necessary to preserve the life of the mother or child, any error in failing to point out the statutory exceptions or justification for such an operation was harmless.

Homicide—Evidence.

8. Evidence of the identity of deceased, whose remains were found burned in a barn, of previous preparation by accused for abortion, and of footprints of accused and the horse he was riding, etc., held to sustain a conviction for manslaughter by direct killing or producing an abortion on deceased.

Criminal Law—Harmless Error.

9. Admission of testimony of a girl friend of deceased that she (deceased) had told her that she would stay home because accused was coming to see her that evening was not prejudicial, where without objection there remained in the record, upon answer to cross-examination, a statement of a state's witness that deceased had told some girls that she had received a letter from accused, and could not go out with them because accused was coming to see her that evening.

Homicide—Evidence—Declarations of Deceased.

10. Declarations of deceased, made in a perfectly natural manner, on the evening of the homicide, that she was about to meet accused were admissible to show that what she intended to do was probably done, and did not violate Section 705 or Section 727, subdivision 4, L. O. L., as to declarations, or any other Code section.

Criminal Law—Evidence—Competency.

11. If evidence is competent for one purpose, it cannot be rejected merely because it is not competent for another purpose, although an instruction, limiting its effect, is proper.

Criminal Law—Evidence—Declarations of Third Persons.

12. Evidence of declaration of third person, tending to show he committed the homicide, is inadmissible.

FROM DISSENTING OPINION.

Criminal Law—Evidence—Real Evidence.

13. The admission in evidence of material objects or allowing inspection of the same, whether offered in evidence or not is within the discretion of the court.

Criminal Law—Evidence.

14. The refusal six months after the homicide to allow the jury to inspect the feet of a horse upon whose tracks the prosecution relied was not an abuse of the court's discretion as to admitting in evidence material objects or allowing inspection of the same.

From Douglas: GEORGE F. SKIPWORTH, Judge.

In Banc. Statement by MR. JUSTICE McBRIDE.

The defendant, Roy A. Farnam, was indicted for murder in the second degree, the charging part of the indictment being as follows:

"He, the said Roy A. Farnam, on the eighth day of December, A. D. 1914, in the said county of Douglas, State of Oregon, then and there being, did then and there wrongfully, unlawfully, feloniously, purposely and maliciously kill Edna Morgan in some manner and by some means unknown to the grand jury; and so he, the aforesaid Roy A. Farnam, did then and there in said county and state commit the crime of murder in the second degree by feloniously, purposely and maliciously killing the aforesaid Edna Morgan, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

The jury returned a verdict, finding defendant guilty of manslaughter. The court, among others, gave the following instructions:

"Now, directing your attention to manslaughter. The statute provides that if any person shall, in the commission of an unlawful act, or lawful act without due caution or circumspection, involuntarily kill another, such person shall be guilty of manslaughter. * * If you find beyond a reasonable doubt that the defendant, while in the commission of an unlawful act, if he did commit an unlawful act, on the night that Beamer's barn burned in Douglas County, Oregon, involuntarily killed Edna Morgan, then it would be your duty to find the defendant guilty of manslaughter. I instruct you that if you find beyond a reasonable doubt that the defendant by any means committed an abortion upon the person of Edna Morgan, then I instruct you that such act, if such act took place, was an unlawful act, and if you find beyond a reasonable doubt that the defendant, on the night that Beamer's barn burned in Douglas County, Oregon, committed an abortion upon the person of Edna Morgan, and if you further find beyond a reasonable doubt that Edna Morgan was

killed as a result of such abortion, if such abortion was committed, then it would be your duty to convict the defendant of manslaughter.”

The defendant by his counsel excepted generally to the instructions in regard to manslaughter. From the judgment of the court upon the verdict the defendant appeals here. The points relied upon in the appeal appear in this opinion, and in the opinions of Mr. Justice HARRIS, concurring, and of Mr. Justice BURNETT, dissenting.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. William W. Cardwell*.

For the State there was a brief over the names of *Mr. George M. Brown*, Attorney General, *Mr. George Neuner, Jr.*, District Attorney, and *Mr. Dexter Rice*, with oral arguments by *Mr. Brown* and *Mr. Neuner, Jr.*

MR. JUSTICE McBRIDE delivered the opinion of the court.

1-4. For the reasons stated in the opinion of Mr. Justice HARRIS, we are satisfied that the defendant was guilty of an unlawful homicide, and that he either shot deceased, which would be deliberate murder, or killed her in the attempt to commit an unlawful abortion upon her, which, under our statute, would be manslaughter. The general rule in this state is that an indictment for murder in the first degree necessarily involves all other grades of homicide which the evidence tends to establish: *State v. Ellsworth*, 30 Or. 145 (47 Pac. 199); *State v. Magers*, 35 Or. 520 (57 Pac. 197); *State v. Crockett*, 39 Or. 76 (65 Pac. 447); *State v. Megorden*, 49 Or. 259 (88 Pac. 306, 14 Ann. Cas. 130). These decisions would seem to foreclose the

contention of defendant's counsel here so far as this branch of the case is concerned, and the case of *People v. Olmstead*, 30 Mich. 431, which suggests a contrary view, we believe to be based upon an erroneous distinction between that class of homicides known as voluntary homicides, in which violence, assault and trespass are involved, and involuntary homicides caused by the doing of an unlawful act, but with no intent that it should result in death. As observed in *People v. Olmstead*, the defect is not one of pleading, but of evidence. If it appears, therefore, from the evidence that the defendant, in attempting to commit an abortion upon the deceased, assaulted her, this brings the case within the ordinary rules of manslaughter. Procuring an unlawful abortion upon any woman always involves an assault in law, even when it is done with her consent and connivance, because no one can consent to an unlawful act. While as between the parties an unlawful act may sometimes be condoned, it is not within the power of any person to waive the violation of the laws of the country. Instances of this are found in cases of mutual agreements to fight, wherein it is held that both parties to such a conflict are guilty of assault and battery, and that each may recover damages from the other for injuries inflicted: 5 C. J. 630, and cases there cited. If procuring an unlawful abortion, therefore, is an assault, the offense comes within those involuntary killings by misdirected violence which constitute manslaughter. At common law the producing of an unlawful abortion resulting in the death of the mother was murder by violence. Our statute by making the offense manslaughter has not created a new crime, but has merely reduced the grade of an old offense by changing the punishment from death to imprisonment in the penitentiary. Thus, in

Chitty's Criminal Law, Vol. 3, p. 800, we find the form of an indictment for procuring an abortion, or rather a series of abortions, the fourth count of which we quote, omitting only formal and archaic allegations:

"And the jurors, etc., do further present that the said E. F. afterward, etc., in and upon A. E. * * [she] then and there being big and pregnant with a certain other child, did make another violent assault, and her the said A. E. and then and there did violently beat, bruise, wound, and ill treat, so that her life was thereby greatly despaired of, and then and there violently, wickedly, and inhumanly pinched and bruised the belly and private parts of the said A. E., and a certain instrument called a rule, which he, the said E. F., in his right hand then and there had and held, up and into the womb and body of the said Anne, then and there violently, wickedly, and inhumanly, did force and thrust with a wicked intent to cause and procure the said A. E. to miscarry and to bring forth the said child, of which she was so big and pregnant, as last aforesaid, dead," etc.

Another count in the same indictment for another abortion attempted upon the same woman charged the defendant with an assault by administering drugs with intent to produce an abortion, and feloniously and of malice aforethought to murder said child. So it is said in Hale's Pleas of the Crown, p. 429:

"If a woman be with child, and any gives her a potion to destroy the child within her, and she takes it, and it works so strongly that it kills her, this is murder, for it was not given to cure her of a disease, but unlawfully to destroy her child within her, and, therefore, he that gives a potion to this end must take the hazard, and if it kills the mother, it is murder, and so ruled before me at the assizes at Bury in the year 1670": See, also, *Margaret Tinckler's Case*, 1 East's P. C. 354.

From these precedents I conclude that at common law the act of producing an abortion was always an assault, for the double reason that a woman was not deemed able to assent to an unlawful act against herself, and for the further reason that she was incapable of consenting to the murder of an unborn infant; and, as already shown, our statute, while it has reduced the grade of the homicide from murder to manslaughter, has not taken away any other element of the offense. This being true, the death of the deceased, occurring by reason of a double assault made both upon her and upon her unborn child, comes clearly within the category of those degrees of felonious homicide by violence which begins with murder in the first degree. The practice of allowing convictions for manslaughter upon indictments for murder in the first degree is no mere creature of our statute, but is as old as the common law. Thus in 1 East's P. C. 340, printed in 1716, we find the following:

"In most cases where justice requires that a man should be put upon his trial for killing another, it is usual (and proper, if there be any doubt) to charge him in the indictment for murder, because in many instances it is a complicated question; and no injury can thereby happen to the individual at all comparable to the evil example of a lax administration of justice in this respect; for the verdict and judgment will still be adapted to the nature of the offense, such as it appears upon the evidence."

In the appendix to Blackstone's Commentaries, Vol. 4, is found a form of judgment upon a verdict of manslaughter upon an indictment charging the defendant with willful murder. From all of these authorities we deduce the principle that procuring an unlawful abortion by any means is always in the eye of the law an assault, both upon the woman operated upon

and upon the unborn child, and that the one who, in producing such abortion, kills the mother stands in no different relation to the law from a person who, in an attempt to shoot A, shoots wild and kills B, except in so far as Section 1900, L. O. L., has modified the punishment. It seems to be the general rule that an indictment in the ordinary form for murder in the first degree is sufficient to sustain a conviction for a homicide committed in the attempt to perpetrate a felony: *Titus v. State*, 49 N. J. Law, 36 (7 Atl. 621); *Commonwealth v. Flanagan*, 7 Watts & S. (Pa.) 415; *People v. Giblin*, 115 N. Y. 196 (21 N. E. 1062, 4 L. R. A. 757); *State v. Covington*, 117 N. C. 834 (23 S. E. 337), and many others. Numerous states in which the courts have held as above have statutes similar to ours in relation to the certainty with which the circumstances of the crime shall be set forth in the indictment. The following is a *résumé* of some of the opinions on this point:

In *State v. Foster*, 136 Mo. 653 (38 S. W. 721), the court says:

“The indictment charges that the murder was committed in the attempt to rob Atwater, but such statement was wholly unnecessary, as the indictment may be drawn in common form, and then, when proof is made that the homicide was done in the perpetration of a robbery, this proof, being made, is tantamount to that premeditation, deliberation, etc., which otherwise are necessary to be proven, in order to constitute murder in the first degree.”

In *Titus v. State*, 49 N. J. Law, 36 (7 Atl. 621), the indictment contained three counts, of which two are considered in the opinion, one being:

“And the grand inquest aforesaid, upon their oaths aforesaid, do further present that the said James J. Titus, on the said eighth day of April, in the year

aforesaid, at the said town of Hackettstown aforesaid, in said county, and within the jurisdiction aforesaid, in and upon one Matilda Smith, in the peace of God and this state then and there being, did commit rape, * * and in committing rape in and upon her, the said Matilda Smith, did kill the said Matilda Smith," etc.

This count was held bad. Another count read as follows:

"In and upon one Matilda Smith, in the peace, etc., did make an assault, and her, the said Matilda Smith, then and there feloniously, willfully and of his malice aforethought, did kill and murder, contrary," etc.

From the opinion I quote as follows:

"At the trial the jury was instructed that if it appeared that the killing was perpetrated by the defendant in committing, or in attempting to commit, a rape upon the woman, he should be found guilty of murder in the first degree, without reference to the question whether such killing was willful or unintentional. The position of the counsel of the defendant upon the point is that, as there is no special count charging that the death of the woman occurred in the attempt to commit or in the commission of a rape upon her, the law will not permit such fact to be proved for the purpose of aggravating the killing, if it was unintentional, into the crime of murder in the first degree. This contention is based upon the sixty-eighth section of the Crimes Act, which declares that, 'All murder that shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate any arson, rape, etc., shall be deemed murder in the first degree and that all other kinds of murder shall be murder in the second degree.' The argument urged in support of the position that a special count was indispensable whenever the state relied on any of the statutory particulars connected with the killing to intensify such killing into murder, was that, as the act created and defined the offense, every constituent of the crime embraced in

such definition must be stated in the indictment. But this proposition cannot be sustained, for it has been conclusively settled by the Court of Errors in this state, in the case of *Graves v. State*, 45 N. J. Law, 205, Id., 358 [46 Am. Rep. 778], that the section relied on did not create any new crime, but 'merely made a distinction, with a view to a difference in the punishment, between the most heinous and the less aggravated grades of the crime of murder.' This decided case seems to us directly in point, for in that instance, the indictment being in the abbreviated form given by the statute, it was insisted that as such form did not embody the statement that the alleged killing was 'willful, deliberate and premeditated,' the pleading was insufficient, as it did not appear that murder, within the statutory definition of the crime, had been committed. The objection was overruled and the indictment was sustained, and it is obvious that if it be not necessary to set out in the count that the alleged killing was 'willful, deliberate and premeditated,' which is one of the categories of murder mentioned in the section, it cannot be necessary to show that the killing was in the commission of a rape, which is another of the categories of the same section."

In the case of *State v. Averill*, 85 Vt. 115 (81 Atl. 461, Ann. Cas. 1914B, 1005), defendant (called respondent in the opinion) was indicted for murder in the first degree. Defendant objected to an instruction upon involuntary manslaughter. The court says:

" 'A lawful act, done in an unlawful or negligent manner, is in law an unlawful act' (*State v. Dorsey*, 118 Ind. 167, 10 Am. St. Rep. 111, 20 N. E. 779); and we think the testimony given by the respondent tended to show that the shooting, though unintentionally done, was the result of negligence by her in handling the gun, indicating on her part a carelessness or recklessness incompatible with a proper regard for human life, which, if established, would in law render her guilty of involuntary manslaughter. * * If an indictment so drawn sufficiently informs the accused of the cause and

nature of the accusation against him for murder, it must follow that it sufficiently informs him of the cause and nature of any offense included within that of murder, for the greater contains the less."

Elsewhere in the same opinion is found the following statement:

"Thus it was established at common law, that a person indicted for the murder of another upon malice prepense may be found guilty of manslaughter, because it does not differ in kind or nature of the offense, but only in the degree—not in substance of the fact, from murder, but only in the ensuing circumstances, a variance as to which does not hurt the verdict."

The court held in the case of *People v. Pearne*, 118 Cal. 154 (50 Pac. 376):

"The indictment charged that the defendant 'did deliberately, willfully and unlawfully kill one Ellen Dogan.' The evidence indicated that the killing was not done deliberately and willfully, but accidentally and unintentionally, and the jury, taking that view of the matter, in the light of the instructions of the court as to the law, found the defendant guilty of 'involuntary manslaughter.' It is now insisted that the indictment charges the crime of voluntary manslaughter, and that under such indictment a verdict of involuntary manslaughter constitutes a fatal variance. * * This position is not well taken. If this indictment had simply charged an 'unlawful killing,' without malice, it would have charged the crime of manslaughter of both kinds, voluntary and involuntary. * * Yet it has always been held that upon an indictment charging murder, a conviction for manslaughter was proper. In other words, when an indictment charges murder, it also charges manslaughter. An indictment laid for murder charges an intentional killing; yet, under the criminal practice and procedure in this state, there is no doubt but that a verdict of involuntary manslaughter would find support in such a pleading. This is so because involuntary man-

slaughter is the 'unlawful killing of a human being,' and such crime is always included in * * murder."

In *Tharp v. State*, 99 Ark. 188 (137 S. W. 1097), the court gave this instruction:

"The jury cannot convict of murder unless the evidence shows a killing in the manner mentioned in the indictment, but may convict of a lower degree of homicide, if the evidence warrants a conviction for a lower degree, whether the killing was done in the manner mentioned in the indictment or not."

The jury found defendant guilty of involuntary manslaughter, and the judgment was affirmed: *White v. State*, 121 Ga. 191 (48 S. E. 941), is to the same effect. The case of *State v. Moore*, 129 Iowa, 514 (106 N. W. 16), wherein the indictment was for murder and the verdict manslaughter under an instruction by the court as to gross negligence, was affirmed. In *Conner v. Commonwealth*, 13 Bush (Ky.), 715, the court says:

"Both voluntary and involuntary manslaughter are included in the crime of murder, and one indicted for murder may be convicted of murder or either of the degrees of manslaughter."

In *Re Somers*, 31 Nev. 531 (103 Pac. 1073, 135 Am. St. Rep. 700, 24 L. B. A. (N. S.) 504), the court says:

"While we are duly impressed with the fact that involuntary manslaughter does not contain the same heinous ingredients necessary to make up the crime of murder in the first or second degree, or of voluntary manslaughter, yet we are clearly of the opinion that, it being an unlawful transgression of the law against homicide, it may properly be considered a lesser degree of homicide, and that a jury * * may properly return in proper cases a verdict of involuntary manslaughter": *State v. Tucker*, 86 S. C. 211 (68 S. E. 523).

In *State v. Whitney*, 54 Or. 438 (102 Pac. 288), the defendant was indicted for manslaughter under Section 1898, L. O. L., referred to in the opinion as Section 1746, B. & C. That portion of the charge in the indictment which was deemed material by the court alleged that the defendant "did feloniously and voluntarily kill one Mabel Wirtz by voluntarily giving and administering unto her, the said Mabel Wirtz, on the fourteenth day of March, 1908, in the said county and state, one suppository containing bichloride of mercury," etc. Mr. Justice EAKIN, in discussing the case, says:

"It becomes important to determine whether it does state acts constituting involuntary manslaughter. The allegation in the indictment is 'By voluntarily giving and administering unto her, the said Mabel Wirtz, on the fourteenth day of March, 1908, in said county and state, one suppository containing bichloride of mercury, a deadly poison, from the effects of which deadly poison, so given and administered, she, the said Mabel Wirtz, became mortally sick, * * and died.' This allegation does not state facts disclosing an unlawful act, or a lawful act done without due caution and circumspection, or any act of criminality. It is not necessary to allege malice or intent to kill. The criminal element consists in doing the unlawful act, without any intention to take the life of decedent, or do her great bodily harm. It is therefore necessary that the indictment disclose that the act causing death was an unlawful act. * * Counsel for the state in his brief cites authorities to the effect that poison negligently administered, or administered with an evil purpose, in the event death follows, is manslaughter. However, it is not alleged that the poison was administered without due caution or circumspection, nor is an evil purpose alleged, and therefore these authorities do not aid the state. Where the charge is murder by poisoning, as is the case in some authorities cited, the indictment charges an intent to murder, thus disclosing

an unlawful act, or evil purpose, and will support a verdict of involuntary manslaughter under Section 1746, B. & C. Comp. This was expressly held in *State v. Ellsworth*, 30 Or. 145 (47 Pac. 199), but in the present case the indictment is confined to a charge of a violation of Section 1746, without alleging an unlawful act."

In the case of *State v. Ellsworth*, cited in the above excerpt, the charge in the indictment was murder by poisoning, and this court held that under such an indictment the court could properly instruct the jury that they might return a verdict of involuntary manslaughter caused by culpable negligence. The authorities above cited indicate that where the indictment charges murder and the proof shows an unlawful, involuntary killing, the defendant may be convicted of such grade of felonious homicide as the evidence seems to warrant.

5, 6. Another reason why the case at bar should be distinguished from the Michigan case is that an indictment in this state is good as to the means by which the offense was perpetrated if it shall appear from the evidence that such means were unknown to the grand jury. This form of indictment is sanctioned by our Code: See form No. 1, p. 1010, Vol. 1, L. O. L., and forms Nos. 5 and 6, p. 1011, L. O. L.; Bishop, Cr. Proc., §§ 495, 553; *Waggoner v. State*, 155 Ind. 341 (58 N. E. 190, 80 Am. St. Rep. 237); *Edmonds v. State*, 34 Ark. 720. In the latter case it is said:

"No doubt the mode or instrument of death, if known to the grand jury, or if it can be ascertained by them, should be alleged in the indictment. * * But this rule must not be carried so far as to furnish a shield from punishment, where it is plain that a crime has been committed. * * It will be seen from the evidence in this case that if the means of death could not

have been so alleged, the crime might have gone unpunished.”

So here. It is conclusively proved that the defendant lured this poor, 15 year old child into a barn remote from human habitation, and that he either murdered her outright, or, in an attempt to produce an abortion to protect himself from the consequences of his own lust, so dealt with her as to bring about her death. The evidence was such that reasonable men, while they might agree as to the fact that an unlawful homicide had been committed (and I cannot see how reasonable men could come to any other conclusion), might well differ as to the means by which, or the intent with which, the offense was committed. Under such circumstances it was eminently proper for the grand jury to charge that it was committed by means to the grand jury unknown.

There is a further reason why it was unnecessary to charge that the offense was committed in an attempt to produce an abortion, and that is this: In my judgment the statute was directed at that class of abortions only wherein the actual consent of the woman, as distinguished from legal consent, is obtained. I take it that if a person should forcibly seize a woman and attempt against her consent to produce an abortion upon her, or should secretly, with the same design, introduce drugs into her food, and by reason of either of these attempts the woman should be killed, Section 1900 of the Code would not apply, but that he would be guilty under Section 1895 or Section 1898, as the facts might appear. The deceased, a poor, motherless child of 15, was incapable of consenting to an assault upon herself, or upon her unborn child. It is sickening to speak of her consenting to the act. It was as much a forcible act as though some scoundrel had met her

upon the road, and, knowing her condition, had seized her, and in the attempt forcibly to bring about a miscarriage had killed her. I am aware of the common-law rule in regard to rape and the defilement of children, but those were exceptions to the general rule in regard to consent which, fortunately, an improved sense of decency has removed by statute, and which should not be extended beyond the limits fixed by a generation less scrupulous than ours in regard to the chastity of children. Upon the whole I am of the opinion that the offense is included in that class of manslaughters by violence that are embraced by the general charge of murder.

7. It is urged that, conceding that manslaughter committed in producing an abortion can properly be considered in a case where the indictment charges murder, the charge of the court in this instance was erroneous, because the court failed to point out the exceptions mentioned in the statute. If there was error in this respect, it was harmless, because there was not the slightest testimony that the operation was necessary to preserve the life of the mother or the child. On the contrary, the evidence indicated that it was wholly unnecessary, and that, if performed at all, it was for the base and sordid purpose of enabling defendant to escape the consequences of his own unlawful act; but there was no error. Where there is no testimony whatever to bring a case within an exception in the statute, the court is not required to charge in relation to such exception. This exact question arose in the case of *Weed v. People*, 56 N. Y. 628. The opinion is short, and we give it in full:

“Plaintiff in error was indicted for procuring an abortion, by administering drugs causing the death of the mother. The questions above stated were raised upon the trial, and were disposed of as there stated.

The court charged, among other things, that if the jury found an abortion had been committed upon deceased, or an attempt had been made causing her death, and that the prisoner was connected with it, they must convict. This was excepted to. It was insisted that the charge was erroneous, as the jury were instructed to convict, notwithstanding they found that the production of the miscarriage was necessary to preserve the life of the deceased, in which case it was not criminal. Held, that the charge was proper, as the evidence showed clearly the absence of any necessity, and no evidence whatever was given tending to show such a necessity, and that therefore there was nothing warranting the submission of that question to the jury."

Error is predicated upon the refusal of the court to permit an inspection of the feet of the horse which the state claimed was ridden by the defendant on the night of the homicide, and also upon the refusal of the court to permit evidence of the declarations of third parties, tending to show that they had committed the homicide. We all concur with Mr. Justice BURNETT in holding that there was no reversible error in either ruling.

For the reasons stated by Mr. Justice HARRIS we are of the opinion that there was no error in the admission of the testimony of Mabel Barton as to statements made to her by deceased on the evening preceding the homicide.

We also concur with Mr. Justice HARRIS in holding that the evidence as to the *corpus delicti* was competent and sufficient.

The judgment of the Circuit Court is therefore affirmed.

AFFIRMED.

MR. JUSTICE HARRIS delivered the following concurring opinion:

8. The scene of the tragedy as told by the record is laid in Cow Creek Valley. The places to be kept

in mind are the Farnam and Morgan residences and the Beamer barn. The defendant lived with his parents, a sister and a brother, Lester Farnam, on a farm about 12 miles east of the town of Glendale. Edna Morgan resided with her father and a younger sister, Esther Morgan, on a farm about 5 miles west of the Farnam place, and about 7 miles east of Glendale. The Beamer barn is located about three quarters of a mile west of the Morgan home, or about $5\frac{3}{4}$ miles west of the Farnam place. A public road runs past the Farnam house, extends west down the valley by the Morgan residence, and then continues on past the Beamer barn to Glendale. The Beamer barn was located about 50 feet south of the road. The building had been erected for a dwelling-house, and afterward converted into a barn. The barn may be described as having a main part and a shed, with the main part facing the road and the shed in the rear. When the main part was changed from a dwelling-house to a barn the ceilings and partitions were taken out, so that there was no loft. Hay was kept in the main part, and on December 8th, 7 or 8 tons were spread on the floor to a depth of between 3 and 4 feet. The southwest half of the shed was used for cows, while horses were kept in the southeast portion. There were only two entrances to the barn. One was on the west side close to the south corner, and opened into the place where the cows were kept, and the other entrance was on the east side and led to the horses. A person could reach the main part by entering either one of the two doors. On the night of December 8th, the entrance to the horses had two bars across it, so as to prevent the horses from getting out, but the other door was left open, so that the cows could come and go.

About half-past 1 o'clock on the morning of December 9, 1914, H. H. Beamer, whose residence is 720 feet from the barn, discovered that his barn was on fire. He went down to the barn, and "stayed until it fell out, and burned down pretty well, just like a pile of hay burning." Beamer and four other persons who were at the barn then went to bed again. About 7 o'clock in the morning Beamer returned to the fire and "saw the remains of a body in the ashes, still burning." The neighbors were immediately notified, and appeared upon the scene, and they then "saw it was the body of a lady," because "there was some hairpins laying right across, kind of back of the skull. There was two right along here, and there was one long corset stay, and one or two small ones curled up next to the long one, and then there was some more laying right side of it." The remains were found lying next to a sill, and the body was permitted to burn until about 10 o'clock that morning when, acting on the advice of the coroner, the fire was extinguished with water. When the fire started, the body was evidently on the hay inside the main part of the barn, because the remains were found at a place which would have been near the south side, but within the main part of the barn. The arms and the legs were, for the most part, consumed by the fire, and while the body had been burned beyond recognition, there was yet enough left undubitably to establish that it was the charred, burned and baked remnant of a once female human being. Between the thighs, and to some extent protected by them and the lower parts of the body from the fire, lay a fetus, which the medical men said had reached about the fifth month of its development. The verdict of the jury was evidently predicated upon the theory that the death of

Edna Morgan resulted from an abortion produced by the defendant.

At the very outset the defendant contends that "there is no proof of the *corpus delicti* from which the court or the jury can say that the body found in Beamer's barn was the body of the missing girl at all," and, further, that "there is not one circumstance from which it can be said that defendant caused the death of Edna Morgan at all, in the commission of an unlawful act or otherwise." It therefore becomes necessary to examine the evidence which was submitted to the jury.

A motive can be ascribed to Roy Farnam which would have been more relentlessly pursuing and more fearfully pressing upon him than upon any other living person. Roy Farnam is an unmarried man, and was about 23 years of age. Edna Morgan would have been 15 years old on December 9, 1914. Their acquaintance with each other dated from about Christmas, 1913; acquaintanceship grew into friendship, and friendship apparently ripened into love; for, commencing with the latter part of June or the first part of July, no other boy or young man escorted Edna Morgan to dances, parties and literary entertainments except Roy Farnam. The defendant admitted that so far as he knew he was the only person who kept company with Edna Morgan. She was a frequent visitor at the Farnam house. It was not unusual for her to be there as often as two or three times a week, and the longest period between her visits was about three weeks. More than once she remained at the Farnam home overnight, and the next day was taken home by Roy. On the Saturday preceding the day of her disappearance she stayed overnight with the Farnam family, and was escorted home the next evening by

the defendant. J. J. Pollock testified that in the latter half of June, 1914, he saw the defendant and Edna come out of the Morgan barn, and observed Roy "brushing her clothing and her hair." Ira Lewis said that on the night of July 1, 1914, between 11 and 12 o'clock he saw the defendant and Edna in a compromising position. Rice Wilson and George Barton testified that on November 8th, they saw Roy and the girl in an unmistakable position. In September, 1914, Mrs. Ella McGee made a one-piece gingham dress for Edna with the waist and skirt sewed together, but so constructed that a belt could be worn if desired. Mrs. McGee found the waist measurement to be 26 inches, and made a belt 28 inches long, so that it had a 2-inch lap. This witness testified that when taking the measurement for the dress she noticed the development of the bust, "more than I had noticed her before. I remarked about it." Edna wore this belt only a few times, and soon discarded it. Margaret Wilson called at the Morgan home on the afternoon of December 8th, and, having noticed the belt on the table, picked it up and tried it on Edna, and found it to be 2 or 3 inches too short. Her father, R. M. Morgan, stated that Edna had not gone to basket-ball games for probably a month prior to her disappearance. Mrs. Emma Herald told the jury that a few days before Thanksgiving she noticed that the girl "looked too large to be normal," and that the impression made upon her was so strong that she spoke to her husband about her suspicions. Verna McGee explained some observations which she made at a basket-ball game about a month prior to December. Helen Ferbrache and Margaret Wilson stated that Edna had worn a certain short blue coat to school, and that they had not seen her with the coat off in school for a long time.

There was ample evidence to warrant the jury in believing that Edna Morgan was pregnant, and that Roy Farnam was the author of her condition.

Edna Morgan was home in the sitting-room during the evening of December 8th until about 10 o'clock, when, according to the testimony of her father, he saw her alive for the last time as she left that room and stepped out into the hall. The father does not know whether she went upstairs to the bedroom which she occupied with her sister, although he supposed at the time she was going to bed. Esther Morgan retired about 8:30 and never saw Edna alive after that time. The next morning the father and Esther arose at the usual hour, and it was discovered that Edna was missing. When Edna left the sitting-room a cap and a raincoat belonging to Esther and the blue short coat belonging to Edna were hanging in that room, but on the morning of the 9th those articles were gone. Three medical witnesses expressed the opinion that the remains were those of a young person, basing their conclusion on the appearance of a wisdom tooth, the condition of certain sex organs, and the upper end of the femur. Physicians also stated that the expulsion of the fetus resulted from an operation with the hand or an instrument, and that death probably occurred after the birth.

About 8 o'clock on the morning of the 9th, before any women had come from the road to view the fire, tracks, apparently made by a woman, were discovered leading from the center of the road about a rod east of a gap or bars in the fence, "right straight toward the gap" in front of the Beamer barn "in toward" the barn. These tracks were indistinct except two. One was close to the gap or bars, but within the right of way of the road, and the other was inside the in-

closure and a few feet from the bars, through which the person making the tracks had evidently gone. Each of the two plain tracks appeared in cow manure. The imprints were made by a No. 3 shoe, and apparently the shoe had a good heel. Edna Morgan wore a No. 3 shoe, and the shoes worn by her that night were comparatively new. The length of the two tracks corresponded with the length of one of her old shoes. Moreover, the very places where the two plain tracks were found would indicate that the woman making those tracks did so in the night, when she could not plainly see where she was stepping.

On the 15th of the preceding October the father purchased a corset from A. H. Henson, a merchant in Glendale. Edna wore this corset that night, because Esther said that she could feel it when she had her arms around the sister while playing with her that evening. The corset could not be found in the Morgan home the next morning. Corset stays and supporter buckles were found with the burned body. A. H. Henson never carried or sold any corsets except W. T. corsets. Indented on the supporter buckles used with the W. T. corsets are the letters and figures: "Pat. 11. 2. 09." These letters and figures appear on buckles found with the body, and, moreover, the buckles that had been in the fire were exactly like those used on W. T. corsets. There are four supporter buckles on the sample W. T. corset received in evidence. Four buckles were found at the Beamer barn. The metallic part of three buttons or grips used in connection with the supporters were panned out from the ashes, and they were exactly like the same part of the buttons or grips found on the sample corset; and, finally, assurance is made doubly sure from the circumstance that the two clasps, which were found with the body,

and are made to fit each other down the full length of the corset, are the exact counterparts of the two clasps on the sample corset.

On December 8th Edna wore the dress that Mrs. Ella McGee had made for her in September. The material and buttons for that dress were supplied by Edna. Mrs. McGee says that Edna furnished her with three large old-fashioned pearl buttons, which the girl said had been used by her mother when living, and that she had no other buttons like them. Those three buttons were sewed on the skirt of the gingham dress. The buttons had "an oval shaped ring carved" in them, and that is what caused Mrs. McGee to "take particular notice to it." One whole button and some pieces were taken from the place where the body lay, and Mrs. McGee testified that the whole button was "exactly like those I put on the dress." There was also some testimony that Edna's front teeth had been shortened by decay, and the record discloses some evidence tending to show that the front teeth of the skull found in the Beamer barn were short. Harry Wilson was at the barn soon after the body was discovered, and he saw the form of a corpse—

"with the head lying in the barn, about the center of the barn. She was lying on her back, and the body-part of the body from the hips up was in this direction, and the corset was one side of it, had fallen off on the sill. She was laying partly on the sill in the center of the barn, and the side that was laying on the sill was still burning. The clothing had burned away, and her form was lying partly on the side; it lay on the corsets, and they burned on the ground, but on the other side they were standing up, held up by the flesh. I saw also the hair of her head lying there, and the hairpins, and I saw the bones of the arm, and her arms, and the form of her legs. Saw also that she wore something of waterproof, you could see the cuffs

—her arms lay this way—and you could see the cuffs of both sleeves; they looked heavier than the bottom of the dress; you could see the cuffs, and three or four inches of the balance. It looked like it had been waterproof cloth. And I could see the bones of the arms laying up this way. And the legs down to the feet. They were badly burned. You could see the form of the legs and the form of the arms.”

Additional evidence appears in the record relative to the appearance of the ashes left by the burning of the wearing apparel. Hairpins and shoe buttons with wire fasteners were found with the body. Mrs. Florence Dewey told the jury that she was up the morning of the 9th on account of her sick mother, who was living in the Eliff house, 810 feet from the Beamer barn; that she stepped out on the front porch to observe the condition of the weather, and noticed a light in the Beamer barn, and “as I turned to go into the house, * * I saw the reflection; I knew the barn was afire, and when I walked a step or two, and went into the door, * * I stopped to look back through to the fire, and as I did so I heard a gun shot at that barn. Some small caliber gun.” Underneath the body Harry Wilson found “three pieces of flat lead; it had melted and run into the crevices.”

Testimony concerning oil of tansy, logwood tea, echinacea, a shoe track, and horse tracks are largely relied upon to connect the defendant with the death of the girl. Evidence concerning a letter written by the defendant and received by the deceased was an important feature of the trial. Oil of tansy is a poison and an abortive agent. Logwood tea is poisonous. Echinacea is used as a blood medicine and to treat blood poisoning. Dr. D. A. Forbes of Canyonville, says that the defendant came to him on September 2, 1914, and told him:

“That he had a cousin, a young lady who had been out with a young man, and she had gotten into trouble, and wanted to know if I would take the case, and I told him I would at term. That is the expiration of the period of gestation. He wanted to know if I could not do something before that time—they did not want to let the case run—and I questioned him with regard to the time, and he said it was two months, and I told him it was not my practice at all to interfere with anything of that kind. And he wanted to know of me, when he found that I would not take the case at all, he wanted to know what I could advise, and I told him I would not advise anything, to begin with, and he asked me then with regard to some drugs, and I told him that anything that he could use in that line was of a poisonous nature, and I would advise him to not fool with it.”

The defendant also spoke to Dr. Forbes about the use of oil of tansy with cattle, and inquired about using logwood tea and oil of tansy. H. E. Jeffries gave some extract of logwood chips to the defendant, who said that he wanted it for a girl, explaining the reason. About three days afterward Roy secured more extract of logwood chips, and at that time told Jeffries that:

“He had inquired of a doctor in Canyonville if that stuff was any good or not, and the doctor told him that the stuff was poison, and any poison would do that, and to be careful.”

Roy subsequently told the witness that the “stuff is no good.”

In September, 1914, the defendant asked J. E. O’Neil, a druggist in Canyonville, for oil of tansy, but the latter had none. On September 6, 1914, and again on September 20th following, B. L. Darby sold oil of tansy to Roy Farnam. On December 10th, a bottle labeled echinacea and a bottle containing oil of tansy were found in the Morgan home in a bureau drawer

used by Edna. The sheriff testified that he exhibited the oil of tansy bottle to the defendant, and the latter "said he got it at Darby's drug-store in Glendale." Mrs. Farnam stated that "we had a bottle just exactly like this" bottle of echinacea. R. M. Morgan testified that he had never had oil of tansy or echinacea about the house. The defendant admitted upon the witness-stand that he was getting the extract of logwood chips for the purpose of an abortion, but claimed that he was getting them for another man.

Thirteen boards fell out of the gable end of the shed where the cows were kept, and were not consumed by the fire, but lay upon the ground undisturbed until turned over in the search for tracks. A shoe-print was found in the mud about 3 feet from the entrance on the west side of the barn, and indicated that the person who made the track had stepped out of that entrance. This track corresponded in every particular with a shoe worn by Roy Farnam on December 8th. Large corrugated hobnails had been driven into the sole of his shoe, and a single row of small nails appeared around the edge of the sole. Similar hobnails, as well as small nails, had been driven in the heel of the shoe. The track revealed the same row of small nails, and plainly showed the imprints made by the hobnails. Measurements were made of the spaces between the nails in the track, and those measurements correspond exactly with the same spaces between corresponding nails found in the shoe. Additional, but indistinct, tracks were found, indicating that the same person had gone out to the fence and across to the north side of the road. A horse had been tied on a hill north of the road.

It will be remembered that the tracks made by a woman led from a point about one rod east of the bars

in front of the barn. Commencing at this point tracks made by a horse were found leading along the north side of the road a short distance and then up a hill to a place in the brush about 180 feet from the road. There were indications showing that the horse had been tied to an oak sapling, and had stood there for an hour or two. There was a ring around the sapling showing that the rough bark had been rubbed as though by a rope tied around it. Black hair was found on the tree, and also on a tree immediately behind the prints made by the hind feet. Some rope fiber was picked up at the foot of the tree, to which the horse had evidently been tied. At about 8:30 on the morning of the 9th, Roy appeared at the scene of the fire, riding a black mare called Black Bess. He tied the mare to the fence on the south side of the road about 50 feet east of the bars at the Beamer barn. The mare was ridden back to the Farnam place that evening. On December 10th the tracks made on the hill on the north side of the road were traced to the Farnam barn. Black Bess was then taken out of the barn, and measurements were made of her hoofs. These measurements correspond exactly, not only with the tracks made by the mare when taken out of the barn at that time, but also with the tracks made by the horse that had gone up the hill. The horse tracks in the road between the Farnam place and the Beamer barn showed that the two trips had been made by the same animal, one set of tracks being slightly fresher than the other. The tracks made on one trip going west turned out of the road in toward the Morgan home, and then proceeded on west toward the Beamer barn. When the mare was taken out of the Farnam barn on the 10th, she was tied with a halter that had a rope, and Lester Farnam testified that a rope was attached

to every halter that they had. Droppings left by the horse when ascending or descending the hill contained wheat, and on the 10th every manger in the Farnam barn contained wheat hay.

Allen Brown testified that he stayed at the Gilliam house on the night of December 8th. The Gilliam ranch is located between the Farnam and Morgan homes, being about three miles west of the Farnam place and about two miles east of the Morgan residence. Brown went to bed about 10 o'clock on the night of the 8th, but was kept awake by a dislocated thumb until about 2 or 3 in the morning. This witness says that about one hour and a half after he went to bed he saw a horse and a rider pass along the road going west, and about 2 o'clock in the morning he heard a horse cross a bridge not far from the house. The defendant says he retired at 10:15 the night of the 8th, and it appears that he arose about 5 o'clock the next morning.

About noon on December 8th, the defendant wrote and addressed a letter to Edna Morgan, and at his request his mother put it in the mail-box, and then telephoned to Edna, telling her that she would receive a letter. The stage reached the Morgan home about 4 o'clock and Edna was seen to receive a letter from the driver. She read it on the way to the house, and then put it in her bosom. That morning Mabel and Alice Barton came to the Morgan home to visit with the Morgan girls, and before the arrival of the stage, it was understood that Edna was to go home that evening with the Barton girls and stay overnight with them, at their home about two miles west of the Morgan place; but, after receiving the letter, Edna decided not to go home with the Barton girls, because she thought that Boy would come down that evening.

After Roy had done the chores, and about supper-time, he was called to the phone by Jimmie Pickett, who asked the defendant to come over to the Jeffries home and play cards that evening, but Roy answered, saying that he could not because he was busy. Afterward the defendant was called to the phone by Edna, and they had some telephonic conversation.

If time and space permitted, many additional details could be recited which dovetail with, strengthen and support the prominent features of the story of Edna Morgan's disappearance; but no attempt will be made to enlarge upon the narrative, except to note that when at the scene of the fire on the morning of the 9th, the defendant said, "I will be blamed for this," and, according to the testimony of Mrs. E. E. Wilson, a short time afterward, and on the same morning, he said, "How much better marriage would have been than this." There was ample evidence to justify the jury to find that the defendant at some time after 10:15 left his home on Black Bess, passing the Gilliam house three miles distant, when Brown says he saw a horse and rider going west, and that, pursuant to an engagement, he picked up Edna at her home, and proceeded on toward the Beamer barn three fourths of a mile away; that as they reached the barn Edna got off the horse at the center of the road, and went in toward the barn, while Roy rode the mare a little farther west down the side of the road, and then up the hill north of the road, and, after tying his horse, joined Edna and went in the Beamer barn with her, and subsequently produced an abortion upon her; that to conceal the crime he set fire to the barn, made his exit through the door at the west end of the shed, went to the fence, crossed to the north side of the road, and on up to the place where the mare was tied, and then

started for home, passing the Gilliam house at about the time when Brown heard a horse cross the bridge, and arriving home considerably before 5 o'clock on the morning of the 9th. Moreover, the shot heard by Mrs. Dewey and the three pieces of lead found by Harry Wilson furnished some evidence at least tending to show that the defendant did not stop with an abortion. While the evidence is circumstantial, still it is stronger both in quantity and quality than the record made in *State v. Williams*, 46 Or. 287 (80 Pac. 655), and the transcript of testimony presented here is in no respect less convincing, but in many particulars is more forceful than the case made by the prosecution in *State v. Barnes*, 47 Or. 592 (85 Pac. 998, 7 L. R. A. (N. S.) 181).

9. The defendant complains of a ruling which permitted an answer given by Mabel Barton to remain in the record. When a witness for the state, Mabel Barton, was asked by the district attorney:

"Now tell the jury what Edna told you about going home with you that evening."

The witness answered:

"She said she could not because she thought Roy was coming down."

The court, however, overruled a motion to strike, on the theory that it was competent for the state to prove that Edna Morgan had planned to meet the defendant, and the testimony was offered by the state for that purpose.

Even though it be assumed that the testimony moved against was incompetent, nevertheless the defendant is in no position to claim that he was materially prejudiced by it. R. M. Morgan was the first witness called by the state. On direct examination he testi-

fied about having seen Edna receive a letter from the stage-driver on the afternoon of the 8th, and upon cross-examination counsel for the defendant asked this question:

“Now then, you say Edna received a letter the day before from Roy Farnam. How do you know the letter was from Roy Farnam?”

The witness answered:

“Charley Hobbs said he got it out of the Farnam mail-box, and it was addressed to Edna. As far as my positively knowing that Roy Farnam wrote the letter that Charley Hobbs gave her, I don't know. All I know is that she got the letter. She told the girls it was from Roy; she could not go home with the Barton girls because Roy was coming that evening.”

The answer was responsive to the question, and no objection was at any time made to any part of the answer. The testimony was elicited by the defendant himself, and it was a part of the record when Mabel Barton testified afterward. Moreover, defendant himself invoked the same rule when offering a letter that had been written by Edna Morgan. The answer of Mabel Barton was substantially the same, and not materially different from the testimony given by R. M. Morgan; even if the court had taken the answer of Mabel Barton from the jury, it is nevertheless fair to assume that the testimony of R. M. Morgan would have remained in the record, for the reason that it was elicited by the defendant himself, and was not objected to at any time during the trial; and therefore the defendant could not have been prejudiced, as now contended by him. It is true that the failure to object to the evidence of R. M. Morgan may not operate as a waiver of any right to object to like evidence on the part of Mabel Barton if such evidence was incompe-

tent; but the indisputable fact still stands out in bold relief that so long as the testimony of R. M. Morgan remained in the record, any failure to eliminate the answer of Mabel Barton could not injure the defendant to the extent claimed by him.

It was competent, however, for the prosecution to show that the deceased intended to meet Roy Farnam that night. The ruling of the court is not within the ban of the hearsay doctrine, nor is it novel or startling. Judicial precedents and text-writers of recognized authority support the admission of declarations made in cases analogous to the one in hand. In *State v. Hayward*, 62 Minn. 474 (65 N. W. 63), Harry Hayward was convicted of having procured one Claus Blixt to murder Catherine Ging. She was shot about 7 o'clock on the evening of December 3d. A Mrs. Hazelton, a witness for the state, was permitted to testify that she was with Miss Ging in a dry-goods store in Minneapolis about 4:35 P. M. on the day of the murder; that the witness and Miss Ging left the store together about 5:00 P. M. and as they were parting Mrs. Hazelton asked Miss Ging to go home with her to dinner, and the latter answered that she could not because "she had a business engagement with Mr. Hayward." The testimony was held to be competent.

In *Hunter v. State*, 40 N. J. Law, 495, Benjamin Hunter was convicted of the murder of John M. Armstrong. At the trial the son of the deceased was permitted to tell the jury that in the afternoon of the day of the murder his "father said he intended to go with Mr. Hunter, and he and Mr. Hunter were going to Camden that night." About one hour after the conversation with the son the deceased wrote a letter to his wife, saying:

"I will not be home much before 9 o'clock. I am going over to Camden again with Mr. Hunter, on business connected with the Davis matter."

The declarations of the deceased were held to be competent, the court saying:

"The present point of inquiry therefore is whether these declarations of Mr. Armstrong to his son, and the similar declarations contained in the note to his wife, can reasonably be said to be competent parts, or the natural incidents of the act of the deceased in going to Camden, which act was incontestably a part of the *res gestae*. After mature reflection and a careful examination of the authorities, my conclusion is that these communications of the deceased should be regarded as constituents of that transaction, for I think they were preparations for it, and thus were naturally connected with it. In the ordinary course of things it was the usual information that a man, about leaving his home, would communicate for the convenience of his family, the information of his friends, or the regulation of his business. At the time it was given, such declarations could, in the nature of things, mean harm to no one; he who uttered them was bent on no expedition of mischief or wrong, and the attitude of affairs at the time entirely explodes the idea that such utterances were intended to serve any purpose but that for which they were obviously designed. If it be said that such notice of an intention of leaving home could have been given without introducing in it the name of Mr. Hunter, the obvious answer to the suggestion I think is that a reference to his companion who is to accompany the person leaving is as natural a part of the transaction as is any other incident or quality of it. If it is legitimate to show by a man's own declarations that he left his home to be gone a week, or for a certain destination, which seems incontestable, why may it not be proved in the same way that a designated person was to bear him company? At the time the words were uttered or written, they imported no wrongdoing to anyone,

and the reference to the companion who was to go with him was nothing more, as matters then stood, than an indication of an additional circumstance of his going. If it was in the ordinary train of events for this man to leave word, or to state where he was going, it seems to me it was equally so for him to say with whom he was going."

In *State v. Smith*, 49 Conn. 376, a conviction of murder in the first degree was affirmed, and the court held that it was competent for the wife of the deceased to testify that as he left his home he said "that he was going to arrest 'Chip Smith,' meaning the prisoner."

In *State v. Mortensen*, 26 Utah, 312 (73 Pac. 562, 633), the defendant was sentenced to death upon a conviction of murder. The wife of the deceased was permitted to testify that after supper on the night of the homicide, as her husband was leaving the house, he closed the door and said to her:

"I am going over to Peter's [defendant's] for a few minutes to collect some money. I will be back soon."

The question of the admissibility of the quoted evidence was considered at length, and in the course of the discussion the court used this language:

"The principal objections to the admission of this testimony urged are that the defendant was not present when the statements were made, and that it is hearsay evidence, and not a part of the *res gestae*. These objections are not sound. The fact that the defendant was not present when the declarations testified to were made is wholly immaterial, and the statements are not merely hearsay evidence. They are declarations of the intention and purpose of the deceased to meet the defendant, and were admissible, as original evidence, under one of the exceptions to the rule of hearsay. Some courts admit such declarations

as a part of the *res gestae*, but we think they more properly come under the exceptions to the rule of hearsay evidence: Greenl. Ev., § 162a. The evidence of these declarations was not admitted for the purpose of showing that the deceased was actually at the house of the defendant, but to show what was in his mind—what his intentions were—at the time of utterance. Evidence of what a person's intentions were is relevant circumstantially to show that he afterward carried out his designs."

In *United States v. Nardello*, 15 D. C. (4 Mackey) 503, it was decided that it was competent to show that when last seen alive, and as he left two companions, the deceased said "he was going out to seek Nardello, to look for him."

In *Thomas v. State*, 67 Ga. 460, Harp Thomas was convicted of murder on circumstantial evidence. On the night of the homicide, when in the act of leaving the house, and a short time before the murder, the deceased said:

"There are two persons down the alley; I think it is Harp and his sweetheart. I will go and see."

The testimony was held to be admissible.

In *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285 (36 L. Ed. 706, 12 Sup. Ct. Rep. 909), the beneficiary, claiming that her husband, John W. Hillmon, was dead, attempted to recover on a policy insuring his life. The company contended that John W. Hillmon was not dead, but that he was alive and in hiding. On the trial the plaintiff introduced evidence tending to show that about March 5, 1879, Hillmon left Wichita, in the state of Kansas, and traveled in South Kansas in search of a site for a cattle ranch, and that on the night of March 18th, while in camp at a place called Crooked Creek, Hillmon was killed by accident on the discharge of a gun. The company introduced evidence

tending to show that the body which was represented to be Hillmon's was not that of Hillmon, but was the body of Frederick Adolph Walters. About the first week of March, Walters wrote a letter to his sister, which read in part as follows:

"I now in my usual style drop you a few lines to let you know that I expect to leave Wichita on or about March 5th, with a certain Mr. Hillmon, a sheep trader, for Colorado or parts unknown to me. I expect to see the country now. News are of no interest to you, as you are not acquainted here. I will close with compliments to all inquiring friends. Love to all."

Under date of March 1st, at Wichita, Kansas, Walters wrote a letter to his fiancée, reading thus:

"Your kind and ever welcome letter was received yesterday afternoon about an hour before I left Emporia. I will stay here until the fore part of next week, and then will leave here to see a part of the country that I never expected to see when I left home, as I am going with a man by the name of Hillmon, who intends to start a sheep ranch, and as he promised me more wages than I could make at anything else I concluded to take it, for a while at least, until I strike something better. There is so many folks in this country that have got the Leadville fever, and if I could not have got the situation that I have now I would have went there myself; but as it is at present, I get to see the best portion of Kansas, Indian Territory, Colorado and Mexico. The route that we intend to take would cost a man to travel from \$150 to \$200, but it will not cost me a cent; besides, I get good wages. I will drop you a letter occasionally until I get settled down; then I want you to answer it."

The communications were held to be competent evidence of the intention of Walters at the time of writing them, the court saying:

"Man's state of mind or feeling can only be manifested to others by countenance, attitude or gesture,

or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distant and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party. The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time, and under circumstances precluding a suspicion of misrepresentation. The letters in question were competent, not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go, and that he went with Hillmon, than if there had been no proof of such intention."

Some of the many additional illustrations of the rule may be found in *State v. Power*, 24 Wash. 34 (63 Pac. 1112, 63 L. R. A. 902); *State v. Dickinson*, 41 Wis. 299; *Mathews v. Great Northern Ry. Co.*, 81 Minn. 363 (84 N. W. 101, 83 Am. St. Rep. 383); *Eighmy v. People*, 79 N. Y. 546; *Commonwealth v. Trefethen*, 157 Mass. 180 (31 N. E. 961, 24 L. R. A. 235); *Common-*

wealth v. Howard, 205 Mass. 128 (91 N. E. 397); *Inness v. Boston etc. R. R.*, 168 Mass. 433 (47 N. E. 193); *The San Rafael*, 141 Fed. 270 (72 C. C. A. 388); *People v. Atwood* (Mich.), 154 N. W. 112; *State v. Hunter*, 131 Minn. 252 (154 N. W. 1083, L. R. A. 1916C, 566); *State v. Garrington*, 11 S. D. 178 (76 N. W. 326); *State v. Howard*, 32 Vt. 380; *Rogers v. Manhattan Life Ins. Co.*, 138 Cal. 285 (71 Pac. 348); *Denver & R. G. R. Co. v. Spencer*, 25 Colo. 9 (52 Pac. 211); *Weightnovel v. State*, 46 Fla. 1 (35 South. 856); *Wal-ling v. Commonwealth* (Ky.), 38 S. W. 429; *People v. Conklin*, 175 N. Y. 333 (67 N. E. 624); *Railway Co. v. Herrick*, 49 Ohio St. 25 (29 N. E. 1052); *Carroll v. State*, 3 Humph. (22 Tenn.) 315; *Sharland v. Washing-ton Life Ins. Co.*, 101 Fed. 206 (41 C. C. A. 307); *Cluverius v. Commonwealth*, 81 Va. 787; *Tilley v. Commonwealth*, 89 Va. 136 (15 S. E. 526); *Harris v. State*, 96 Ala. 24 (11 South. 255); *State v. Peffers*, 80 Iowa, 580 (46 N. W. 662); *State v. Jones*, 64 Iowa, 349 (17 N. W. 911, 20 N. W. 470); *State v. Winner*, 17 Kan. 298; *Territory v. Couk*, 2 Dak. 188 (47 N. W. 395); *Reg. v. Buckley*, 13 Cox's Cr. Cases, 293. See, also, 3 Wigmore, Ev., § 1725; 16 Cyc. 1184; 7 Ency. Ev. 622; *State v. Giudice*, 170 Iowa, 731 (153 N. W. 336, 342).

The concrete examples previously noted are not sporadic instances of the application of any strange and extraordinary doctrine, but, on the other hand, they are fairly illustrative of a rule of evidence which is firmly established by the overwhelming weight of judicial opinion. Jurists and text-writers, however, do not agree upon the theory of the doctrine. Declarations, like the one considered here, are, by many, and perhaps, by most, of the authorities, admitted as part of the *res gestae*; they are spoken of by some as verbal acts; and they are characterized by others

as original evidence admissible as an exception to the hearsay rule. An exemplification of the application of the rule and at the same time an illustration of the difference of opinion as to the basis of the rule may be found in *State v. Hayward*, 62 Minn. 474 (65 N. W. 63), where all the members of the court agreed that the declaration of the deceased was competent, the majority holding that:

“This statement forms a connected part of the evidence, and tends to characterize her subsequent acts and her departure on the fatal ride soon after she made the statement. This statement was not mere self-serving, hearsay evidence, but a verbal act, just as relevant as would be evidence that prior to her departure she put on her cloak or hat.”

—and Mr. Chief Justice START saying that:

“This evidence clearly falls within the rule that, when the question is whether a person did a certain act, his declarations, oral or written, made prior to and about the time he is alleged to have done an act, to the effect that he intended to do it, are admissible as original evidence, if made under circumstances precluding any suspicion or misrepresentation.”

While the writer inclines to the view expressed by Mr. Chief Justice START, 3 Wigmore, Ev., § 1726, *Jacobi v. State*, 133 Ala. 1 (32 South. 158), and *State v. Mortensen*, 26 Utah, 312 (73 Pac. 562, 633), yet the rule itself is now of more concern than the theory upon which it is founded.

If the doing of an act is a material question, then the existence of a design or plan to do that specific act is relevant to show that the act was probably done (1 Wigmore, Ev., § 102); and, considering the plan or design as a condition of the mind, a person's own statements of a present existing state of mind, when made in a natural manner and under circumstances

dispelling suspicion and containing no suggestion of sinister motives, only reflect the mental state, and therefore are competent to prove the condition of the mind, or, in other words, the plan or design.

10, 11. The declaration of Edna Morgan was made in a perfectly natural manner, and there is nowhere in the record any intimation that it was made otherwise. The whereabouts of Edna Morgan was a material issue. It was important to know what she did and where she went. The state contended that she met the defendant and accompanied him to the Beamer barn. Evidence of her declaration was competent to show what was in her mind, and that what she intended to do was probably done: *State v. Mortensen*, 26 Utah, 312 (73 Pac. 562, 633). The language used by her was only one way of stating that she intended to meet Roy Farnam, especially when it is remembered that on the preceding Sunday the defendant had accompanied Edna Morgan to her home after her visit with the Farnams. The jurors were not obliged to conclude that the letter alone and of itself prompted the statement made by her. The letter was not produced at the trial, and was probably destroyed. Testimony concerning the utterance made by Edna Morgan was neither offered nor admitted for the purpose of showing what Roy Farnam intended to do or did, but the transcript of the evidence discloses that the prosecution offered the testimony for the sole and express purpose of showing what Edna Morgan intended to do, and consequently the admission of the evidence did not violate Section 705, L. O. L. The statement made by the deceased did not recount anything that had previously occurred; it was not the statement of a fact external to the mind; it was not a narrative of a past event; and it does not belong to that class of utterances which are either expressly

permitted or impliedly rejected as evidence by Section 727, subdivision 4, L. O. L. The rule making the statement of Edna Morgan admissible does not contravene any section of the Code. If, as held by most courts, the *res gestae* doctrine is the basis of the rule admitting the declaration, then it is expressly sanctioned by the Code; or if the rule is founded on the idea that the utterance is a verbal act, a notion entertained by a few courts, then, strictly speaking, the evidence is not hearsay; or if, as the writer thinks, the true theory of the rule is that the statement of the deceased is original evidence of her intention, which the jury can consider as a circumstance indicating that she probably did what she intended to do, then on that theory no section of the Code is transgressed. The rule in question is analogous to the doctrine, approved by this court and recognized generally, making exclamations of pain original evidence of a circumstance tending to show a particular bodily condition when the bodily condition of the person is a relevant fact: *State v. Mackey*, 12 Or. 154, 158 (6 Pac. 648); *Thomas v. Herrall*, 18 Or. 546, 549 (23 Pac. 497); *Vuilleumier v. Oregon W. P. & R. Co.*, 55 Or. 129, 132 (105 Pac. 706); 16 Cyc. 1164. If evidence is competent for one purpose, it cannot be rejected merely because it is not competent for another purpose. Being competent to show what Edna Morgan intended to do, the testimony of Mabel Barton was not rendered incompetent for all purposes merely because it was incompetent for the purpose of connecting Roy Farnam with the alleged crime, although it would have been proper to instruct the jury to limit the evidence to the sole purpose for which it was competent, and a failure to give a requested instruction to limit the application of the evidence to the single purpose for

which it is admissible would be error; but here the contention is that the testimony was not competent for any purpose: *State v. Finnigan*, 81 Or. 538 (160 Pac. 370). The conclusion that the testimony of Mabel Barton was competent has been reached with a full knowledge of the expressions to be found in *State v. Glass*, 5 Or. 73, 82; *State v. Anderson*, 10 Or. 448, 454; *State v. Ching Ling*, 16 Or. 419, 424 (18 Pac. 844).

12. I concur in what Mr. Justice BURNETT says about the refusal to permit an inspection of the feet of the mare and the rejection of the offer to prove the declarations of another person to show that such person had committed the crime charged against the defendant. I concur in the reasoning and conclusion of Mr. Justice McBRIDE relative to the sufficiency of the indictment to support the verdict of the jury. There was sufficient evidence to show that Edna Morgan was killed, and that the defendant caused her death; and, in my opinion, no prejudicial error was committed during the trial.

MR. JUSTICE BURNETT delivered the following dissenting opinion.

The defendant was accused of the crime of murder in the second degree by an indictment reading thus:

“Roy A. Farnam is accused by the grand jury of the county of Douglas, State of Oregon, by this indictment, of the crime of murder, committed as follows: He, the said Roy A. Farnam, on the eighth day of December, A. D. 1914, in the said county of Douglas, State of Oregon, then and there being, did then and there wrongfully, unlawfully, feloniously, purposely and maliciously kill Edna Morgan in some manner and by some means unknown to the grand jury; and so he, the aforesaid Roy A. Farnam, did then and there in said county and state commit the crime of murder in the second degree by feloniously, purposely and

maliciously killing the aforesaid Edna Morgan, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon."

The errors assigned relate to proceedings during the trial on the plea of not guilty. The decedent, Edna Morgan, was a girl aged 15 years, and resided with her father, her junior sister, and two younger brothers at a point on the Pacific Highway about seven miles east of Glendale, in Douglas County. The defendant is a man about 23 years of age, living about five miles still farther east of Glendale, with his father, mother, sister and brother. So far as known, the last time the deceased girl was seen was by her father at their home late in the evening of December 8, 1914. About half-past 1 of the morning of the 9th, the barn of a man named Beamer, about a mile west of Morgan's residence, was found to be in flames. Later in the morning, when the building was almost entirely consumed, there was discovered in the fire the remains of a female. The body was so nearly destroyed as to be unrecognizable. It appears that for some months previously the defendant had kept company with Edna Morgan, escorting her to various places of entertainment, and she visited at the home of his parents, where his mother sometimes did sewing for her, as her own mother was dead. Some tracks were found near the burned barn, and evidence was given, tending to show that they matched with shoes worn by the defendant, and there were other tracks which corresponded in size to shoes worn by the deceased. A fetus, said by the medical witnesses who examined it to have arrived at about the fifth month of gestation, was found between the thighs of the corpse. Mabel Barton, a witness for the prosecution, aged 15 years, testified that

she and her sister went to the Morgan home about noon of December 8th to visit the Morgan girls, and in response to her invitation Edna agreed to go home with her and spend the night, but that during the afternoon the stage came along from the east, and the driver gave Edna a letter, which she read and put in her bosom. The prosecution then asked her this question:

“Now, tell the jury what Edna told you about going home with you that evening.”

The witness answered:

“She said she couldn’t because she thought Roy was coming down.”

Defendant’s counsel moved to strike out the latter part of the answer, referring to her statement that she thought Roy was coming down, but the court denied the motion, and allowed the entire response to go to the jury, over the exception of the defendant. The defense also offered to show oral statements made by a third party, tending to show that he himself had committed the murder of the woman whose body was found in the ruins of the barn. The court refused to receive that testimony, and the defendant assigns this as error. There was evidence tending to show that horse tracks were found leading from the direction of the defendant’s residence to the burned barn and back again, and that they were identical with the tracks made by a mare ridden by the defendant over the same course and part way back on the day following the fire. One witness testified, in substance, that the track of the right front foot was nearly straight on the inside. At the trial in June, 1915, the defendant had the mare at the courthouse where the trial was held, and asked to have the jury inspect her foot, and afterward

offered the mare herself in evidence, but the court rejected his offer in both instances, and this is relied upon as error. At the conclusion of the argument the court stated to counsel, in substance, that the indictment charges murder in the second degree, and necessarily includes the crime of manslaughter, and that it was the view of the court that the latter offense should be submitted for the consideration of the jury, saying, however, that if counsel disagreed the court would hear them. Counsel for defendant then stated:

“We have no objection; I will nail my colors to the mast and sink or swim.”

After some further parley with the district attorney the court said:

“I do not think there is any evidence as to the first section I read with reference to deliberation or heat of passion. I do not think there is any evidence to submit the case to the jury. I think I will submit murder in the second degree and manslaughter as by Section 1898 [referring to Lord’s Oregon Laws].”

No exception was taken to this remark of the court. In the course of the instructions to the jury the judge charged as follows:

“If you find beyond a reasonable doubt that the defendant, while in the commission of an unlawful act, if he did commit an unlawful act, on the night that Beamer’s barn burned in Douglas County, Oregon, involuntarily killed Edna Morgan, then it would be your duty to find the defendant guilty of manslaughter.”

“I instruct you that if you find beyond a reasonable doubt that the defendant by any means committed an abortion upon the person of Edna Morgan, then I instruct you that such act, if such act took place, was an unlawful act, and if you find beyond a reasonable doubt that the defendant on the night that Beamer’s barn burned in Douglas County, Oregon, committed an

abortion upon the person of Edna Morgan, and if you further find beyond a reasonable doubt that Edna Morgan was killed as a result of such abortion, if such abortion was committed, then it would be your duty to convict the defendant of manslaughter."

At the close of the charge the defendant by his counsel excepted to all the statements of the court in charging the jury respecting manslaughter. The jury returned a verdict of guilty of manslaughter, and from the consequent judgment the defendant appeals.

As a judicial utterance it is not by the mark to assume the guilt of the accused as an established premise, nor to declare that it is conclusively proved. Mobs argue thus. It is the office of the prosecuting advocate to array his facts and employ pathos and invective to sway the jury and secure a verdict against the defendant. The function of a court of last resort is to ascertain from the record whether the trial court has observed the law in admitting or excluding testimony and in its charge to the jury. Under such ascertained conditions alone that body of 12 men has the exclusive prerogative of declaring whether the guilt of the defendant is established conclusively or otherwise. As pithily stated by Mr. Justice McBRIDE in *State v. Rader*, 62 Or. 37, 41 (124 Pac. 195):

"For the jury to find the fact, the court must see that they receive only legal evidence, and no good finding of fact can ever be predicated upon illegal evidence."

Equally important in a jury trial are accurate statements to the jurors of the law applicable to the issue in hand: *Forrest v. Portland Ry., L. & P. Co.*, 64 Or. 240 (129 Pac. 1048); *Sullivan v. Wakefield*, 65 Or. 528 (133 Pac. 641). Let us consider whether these requirements have been fulfilled.

The record discloses that the case was tried upon purely circumstantial evidence. It became necessary, of course, to trace the defendant to the scene of the murder. It was evidently for this purpose that the state introduced the testimony of Mabel Barton, to the effect that Edna Morgan refused to go home with her because she thought he was coming down. Evidence tending to locate the decedent at the scene of the murder would indeed be relevant. Testimony, therefore, that she refused to go home with Miss Barton, but stayed at her father's house, was competent to locate Edna Morgan, but neither her thoughts nor the expression of them could be held to bind the defendant in tracing his movements. The prosecution relies upon the case of *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285 (36 L. Ed. 706, 12 Sup. Ct. Rep. 909). That was an action by the beneficiary upon the policy insuring Hillmon. In response to evidence by which the plaintiff claimed to have proved the death of the assured, the defense sought to establish that the body said by the plaintiff to be that of the insured named in the policy was that of one Walters. For this purpose the company was permitted to read his letters to his sister and his fiancée, announcing his intention to go with Hillmon, the assured, into the vicinity where the corpse was found. All this was for the purpose of disclosing the movements of Walters, and not those of the insured. *Commonwealth v. Trefethen*, 157 Mass. 180 (31 N. E. 961, 24 L. R. A. 235), is a leading case on this subject, often cited to support the use in evidence of the declarations of third persons not parties to the litigation. There the defendant was on trial for the murder of Deltena Davis, a young woman with whom he had kept company. He offered to show by a clairvoyant named Hubert that a short time before

her body was found in the river Miss Davis had stated that she was advanced five months in pregnancy, and declared her intention to drown herself. The trial court refused his offer, but the Supreme Court held this to be erroneous, and that in order to show the cause of death the decedent's statement of her own purpose was competent to throw light upon her own subsequent conduct. The opinion by Mr. Chief Justice FIELD clearly limits such declarations to the state of mind or intent of the person making them, and declares them to be hearsay as to other persons or other affairs. He says:

"The most obvious distinction between speech and conduct is that speech is often not only an indication of 'what is in the mind' of the speaker, but a statement of a fact external to the mind, and as evidence of that it is clearly hearsay. * * Suppose that, at the interview between the deceased and the witness Hubert, if there was such an interview, the deceased had said that Trefethen was the father of her child; evidence that the deceased said this is clearly hearsay, and is not admissible to prove that he was the father; but suppose that it had been denied at the trial that the deceased knew that she was pregnant, testimony that she had said that she was pregnant would be some evidence that she knew it."

Likewise, in *State v. Hayward*, 62 Minn. 474 (65 N. W. 63), the *ante-mortem* statements of the deceased were used in evidence in tracing her own steps to the scene of the murder, but not as affecting the movements of the defendant. Also in *State v. Power*, 24 Wash. 34 (63 Pac. 1112, 63 L. R. A. 902), the syllabus reads thus:

"Where, on a trial for manslaughter by acts intended to produce a miscarriage, the deceased, on leaving her home for the place where the acts are alleged to have been performed, made statements as to

her intentions in going, such statements are admissible as verbal acts characterizing her intentions, but not as evidence that the defendant produced the abortion."

The doctrine is crystallized in Section 705, L. O. L., thus:

"The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them."

By this excerpt from the Code the legislature has removed the question from the speculations of doctrinaires and the demands of overzealous prosecutors. It renders inapplicable the precedents cited in support of Mabel Barton's testimony. Under this provision we constantly hold in civil cases, where only money or other property is involved, that the declaration or act of one person shall not be taken to bind another, unless the authority to make the statement is first shown. Here, where the lifelong liberty of the accused is at stake, the prosecution calls upon us to admit the hearsay of Edna Morgan's utterance, not of any fact, but of what she thought, all without the least showing of any authorization from the defendant. The rule in criminal cases ought to be at least as strict as in civil contentions: Section 1535, L. O. L. Moreover, the reception by her of the note from the defendant is the only thing disclosed by the evidence which apparently could have influenced her to make the remark attributed to her. The only light on the contents of that letter is derived from the testimony of the defendant and his mother, to the effect that he had written to Edna that she could come to the Farnam home with his mother and sister the following Friday, as they returned from Glendale, which would save him from making a special trip for her. We cannot ignore this report of the contents of the writ-

ing, for there is no testimony to contradict it. There is nothing in it to induce her to expect the coming of the defendant, or to lead her to make the statement. On the contrary, the normal inference would be that he was not coming, and if for no other reason her statement to Miss Barton ought to be rejected, because it varies from what she would naturally say when she learned that he had planned for someone else to bring her to the home of his parents. There is nothing disclosed that gave her any right even to think he was coming. The better reason, however, is that, as against him, she had no authority to say she thought he was about to visit her. Her declarations or her thoughts on that subject are utterly incompetent as evidence as against the defendant. Respecting herself, the only material inquiry was concerning her whereabouts. Her reasons for remaining where she was are wholly immaterial and irrelevant, and cannot be admitted to the prejudice of the defendant. The error was essentially detrimental to him, because it related to the very material requisite of proving that he was at the scene of the crime when it was committed. Besides being a violation of the rule laid down in Section 705, L. O. L., the testimony of Mabel Barton on that point was the purest hearsay, and falls within the condemning reasoning of Mr. Chief Justice FIELD in the Trefethen Case. As applied to the defendant, her statement was of a fact external to her mind within the language of that opinion above quoted, and hence the purest hearsay. As affecting the *res gestae*, the best evidence of Edna Morgan's whereabouts was the testimony of her father and sister, to the effect that she was at home until bedtime of the night of her disappearance. Her refusal to go home with her friends was indicative of nothing more about her movements

than what was related by her father who saw her last. In the light of his testimony her staying at home during the preceding afternoon is negligible. The sole purpose of putting in evidence her unwarranted remark that she thought Roy was coming, and the only way the jury must have understood it, was to allow them to infer that he had written her he was coming, and upon this inference to presume that he did come and, finally, to infer on top of all this that they went together to Beamer's barn. This court has condemned such procedure in *State v. Hembree*, 54 Or. 463 (103 Pac. 1008). In that case the prosecution deemed it important to show some motive which urged the defendant to kill his wife, for whose murder he was being tried. For this purpose the state essayed to prove that he had sustained incestuous relations with his daughter and knowledge thereof on the part of the wife. All that was shown was a possible opportunity for illicit intercourse between the father and daughter while they were at a hotel in Tillamook. From this circumstance as stated by Mr. Chief Justice MOORE, who wrote the opinion, the jury was permitted to infer that the defendant had committed incest with his daughter; that from such deduction they were allowed to infer that the wife and mother had obtained knowledge of it, and that, based thereon, the jury was authorized to infer a motive for the commission of the alleged crime. A conviction was reversed for the error thus committed. On the point now under discussion that case is controlling in principle. The effort to prove the declarations of another person, tending to show that he had committed the crime in question, was properly rejected by the court under the authority of *State v. Fletcher*, 24 Or. 295 (33 Pac. 575). There the court held that such testimony was

hearsay, and on that ground rejected it. By the same token we should rule out the testimony of Mabel Barton about the declaration of the deceased, to the effect that she expected the defendant to visit her.

Again, the statute has prescribed the instances in which the declarations of a deceased person may be admitted in evidence. Section 727, subdivision 4, L. O. L., reads thus:

"In conformity with the preceding provisions evidence may be given on the trial, of the following facts: * * 4. The declaration or act, verbal or written, of a deceased person, in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the declaration or act of a deceased person, made or done against his interest in respect to his real property; and also the declaration or act of a dying person, made or done under a sense of impending death, respecting the cause of his death."

Only thus far has our Code opened the door for the admission of hearsay testimony concerning the declarations of deceased persons. The mention of these instances is the exclusion of all others. This is in accord with *State v. McGrath*, 35 Or. 109 (57 Pac. 321), teaching that the Code is complete on the subject of evidence. Treating of the construction of statutes, Section 715, L. O. L., is as follows:

"In the construction of a statute, * * the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all."

Section 716, L. O. L., provides thus:

"In the construction of a statute the intention of the legislature * * is to be pursued, if possible; and when

a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent shall control a general one that is inconsistent with it."

We have no right to read into the statute an additional exception to the general rule against hearsay testimony. The opinion of Mr. Justice RAMSEY in *State v. Goddard*, 69 Or. 73, 78 (133 Pac. 90, 138 Pac. 243, Ann. Cas. 1916A, 146), is a valuable writing on the doctrine of statutory construction as applied to this case and to this particular section of the Code. The general rule about the declarations of deceased persons is that they are admissible only as to such things concerning which the deceased, if alive, would be allowed to testify: *State v. Saunders*, 14 Or. 300, 305 (12 Pac. 441). Applying the doctrine to the present issue, we will suppose, for illustration, that the defendant had been indicted for assault with intent to kill Edna Morgan, and she had come to testify at the trial in such a case, as in this; it would be necessary to prove that she and the defendant met each other, but it is plain that she could not be allowed to declare on the witness-stand that she said to Mabel Barton, "I think Roy is coming down." If, when alive, she could not tell what expression of her thoughts she made to some other person—and no one pretends that she could—hearsay evidence of it cannot be rightfully given after she was dead. Her death adds no sanction to the declaration of her expectation. On this point Mr. Justice THORNTON wrote thus in *People v. Taylor*, 59 Cal. 640, 645:

"The law is well settled that the declarations of the deceased are admissible only to those things to which he would have been competent to testify if sworn as a witness in the cause. They must relate to facts only, and not to mere matters of opinion (1 Greenl.

Ev., § 159; 1 Whart. Am. Cr. L., § 678; *People v. Sanchez*, 24 Cal. 26; *Warren v. State*, 9 Tex. App. 629 [35 Am. Rep. 745]), or belief (*R. v. Sellers*, O. B. 1796, Car. C. L. 233; *McPherson v. State*, 22 Ga. 478; *Johnson v. State*, 17 Ala. 618; *McLean v. State*, 16 Ala. 674; 2 Barn. & C. 608; *Nelson v. State*, 7 Humph. [Tenn.] 542. * * The deceased could not have been allowed to testify as to his guesses, or as to whom he thought might have poisoned him, which was nothing more than an opinion or conjecture."

Why should Edna Morgan dead be more competent as a witness than Edna Morgan living?

It matters not that the bill of exceptions fails to show that the defendant excepted to other testimony of the same kind that was elicited on cross-examination. He is not estopped to urge the objection when properly presented. He is not required to multiply exceptions on the same point indefinitely. One specification of error of the same kind is sufficient to raise the question for adjudication without padding the record with repetitions of the same objection.

It is true that the courts have measurably receded from the old doctrine that a defendant on trial for a felony cannot waive anything in his favor, but it is going to the other extreme to hold that because his counsel by possible inadvertence fails to object to certain incompetent testimony given by one witness, the defendant thereby waives the right to except to like statements of those testifying afterward. Waiver ought not to be pushed to such an extent, yet this is the only deduction to be drawn from the utterance of Mr. Justice HARRIS, to the effect that the defendant was not harmed by the statement of Miss Barton, because a similar declaration by Mr. Morgan was allowed to pass unchallenged. Neither is such evidence in the same category as expressions of pain or of the nature

of the malady affecting the declarant as approved in *State v. Glass*, 5 Or. 73. Under that precedent the defendant was rightly permitted to read in evidence Edna Morgan's letter, written about a month before her alleged death, in which she spoke of her then "sick week." This was competent, as her declaration about the state of her own health, to show that she could not have been five months' advanced in pregnancy, as the testimony tended to show was the case with the woman whose remains were found in the burning barn. The admission of that letter in evidence does not, in any manner, estop the defendant from opposing the attempt of the prosecution to bind him by hearsay testimony of Edna's unauthorized declaration of what she thought he was going to do.

On the subject of admissibility of statements of a deceased person, the victim of the homicide, the following precedents are here noted: In *People v. Carkhuff*, 24 Cal. 640, the defendant was indicted for the murder of his uncle, with whom he resided. A witness for the prosecution testified as follows:

"Deceased and I lunched together, about 2 o'clock p. m. My wife invited deceased to take supper with us. He declined, saying he must go home to attend to cooking apples. He said Sam, meaning defendant, would be home that night; that he had gone to the park to see a favorite officer and witness a review."

All the evidence tending to connect the defendant with the crime was circumstantial. The deceased was last seen alive about 2 o'clock p. m. on Sunday, and his corpse was found at his house between 7 and 8 o'clock on Monday. The court there says:

"The only object of the prosecution in offering in evidence the declaration of the deceased that the defendant would be at home on Sunday night was to enable the jury to presume, from the fact that the de-

ceased expected the defendant to return that night, that he did so return, and was there at the time of the commission of the murder. It is impossible to conceive upon what theory that declaration was admissible. If the declaration had been made to the witness by any other person, it would not be contended that it was admissible in evidence, for evidently it would be obnoxious to the objection that it was hearsay testimony. The fact that the declaration was made by the deceased does not tend to remove the objection, for the declarations of the deceased are permitted to be proven in the single case when they are made *in extremis*, and have reference to the circumstances of the death, unless the declaration constitutes a part of the *res gestae*, or can be classed with declarations against interest, etc. * * It was not admissible as a part of the *res gestae*, for it did not constitute one of the circumstances surrounding the murder. The expectation of the deceased that the defendant would return, and that, too, unsupported by any evidence of the reasons for his expectations, did not even tend to prove any fact connected with the murder. The expectation may have been without any foundation; may have been merely a surmise arising from the defendant's usual habits. His expectation or declaration that the defendant would return at the time stated would possess no more legal value as evidence to prove the fact that he did return than would the expectation of his neighbor, Burns, that the defendant would return at the given time."

Cheek v. State, 35 Ind. 492, was a murder case wherein a witness was allowed to report a conversation with the deceased, just prior to the homicide, wherein the latter said:

"Doc, I am glad you have come; there are two ruffians going up the road, and they have threatened to take my life; they have gone to my house, and I want you to go back with me."

The court there held on this point that:

"A statement of the deceased person, made before the commission of the act, and not made in the presence or hearing of the defendant, is not competent evidence against him."

In *Weyrich v. People*, 89 Ill. 90, a wife was indicted for the murder of her husband by poisoning. It was held to be error to admit the declaration of the deceased that he suspected his wife to be unchaste, in the absence of any proof that such suspicion was ever communicated to her. In *People v. Irwin*, 77 Cal. 494 (20 Pac. 56), it was said that:

"The declarations of the deceased to third parties at various times before the homicide as to his fears of murder, and that he intended to leave the country because the defendant and others were conspiring to take his life, and that he had given them no cause, etc., are not admissible in evidence, and to admit them is highly prejudicial error."

In *People v. Gress*, 107 Cal. 461 (40 Pac. 752), the defendant was accused of murder. A witness detailed a conversation with the decedent had the evening before the homicide. The murdered man told him:

"I am in trouble. I have a family in Sonora, and a few months ago I took a young man in as partner with me, and here lately I have discovered that he is about to get away with my wife and child, and I want to get to Sonora as quick as possible. I want to save my boy, and that's my hurry for coming here."

Treating of this subject the court said, speaking by Mr. Justice VAN FLEET:

"This evidence was clearly hearsay, and was wholly inadmissible upon any possible theory of the case, or upon any principle or rule of evidence known to the law. It was no less hearsay because the declarations were those of the deceased, since proof of such declarations are only admissible when made *in extremis*; dying

declarations, having reference to the circumstances of the death, or when they constitute a part of the *res gestae*. * * In this case they were neither. The mortal blow had not been struck, nor were they in any manner connected with the rencounter which resulted in Assalena's death. Obviously the admission of this evidence was highly prejudicial to the defendant, since its inevitable tendency would be to greatly inflame and prejudice the minds of the jury against him."

In *Montag v. People*, 141 Ill. 75 (30 N. E. 337), the defendant was accused of the murder of his wife. It appeared that on the day of the homicide he called at the store where the shooting occurred between 12 and 1 o'clock, and had an interview with the deceased, lasting some two or three hours. He then left the store, but in a short time returned, and then the shooting occurred. A witness was allowed to give a conversation had with the deceased, which occurred 10 minutes after the defendant had left the store and 15 minutes before he returned. In answer to the question, "What did the deceased say to you after he had been out 10 minutes?" she replied:

"She told me that he warned her if he couldn't come and see her that night he would kill her. I asked her if she wasn't afraid, and she said no."

Quoting from the syllabus, the rule is there laid down thus:

"Declarations, to become a part of the *res gestae*, must be made at the time of the act done which they are supposed to characterize or illustrate, and must be calculated to unfold the nature and quality of the facts they are intended to explain, and to so harmonize with them as obviously to constitute one transaction. What occurs before or after an act has been done does not constitute a part of the *res gestae*, although the interval or separation may be very brief."

In *Kirby v. State*, 9 Yerg. (Tenn.) 383 (30 Am. Dec. 420), a statement of the deceased the day before he was killed that he was going on a certain trip, and that the defendant was to accompany him, is not admissible. In *State v. Punshon*, 124 Mo. 448 (27 S. W. 1111), a husband was prosecuted for the murder of his wife. He offered to show that their domestic relations were pleasant, also what she said as to the cause of her absence from him; her threats to kill herself, the reason therefor; that she was an expert in the use of firearms, and was in the habit of carrying a revolver. After discussion of the authorities cited, the court said:

“The statements of the wife which were offered to be proven were not part of the *res gestae* as exclamations of pain, nor were they with respect to her health, as in [authorities cited] and were properly excluded; and so were her statements to the effect that she intended to kill herself, for the same reasons. She was no party to the prosecution, and the state was not bound by anything she may have said. * * It will not be seriously contended that, if defendant’s wife had been living, and he had been indicted for assault with intent to kill her, anything she might have said in regard to their amicable relations would have been admissible against the state, and, if not then admissible, the fact that she was dead at the time of trial did not make such statement permissible.”

In *Parker v. Commonwealth* (Ky.), 51 S. W. 573, a murder case, the following language appeared:

“The court allowed John A. Murray, the father-in-law of the deceased, to testify to a conversation between them before the deceased started down the road, and he allowed the witness Buck York to state a similar conversation between him and the deceased at his house, in regard to his purpose in going down the road. This evidence was incompetent. The accused was not present, and evidence could not be made against him by statements not in his presence, and not in any way

connected with the shooting or throwing any light on it."

Holland v. State, 162 Ala. 5 (50 South. 215), was a murder case. The court there said:

"The conversation between the deceased and Annie Liggan before the killing, and while the defendant was absent from the house, was not admissible. Neither should the trial court have permitted Mrs. Taylor to testify that deceased told her, about five minutes before the difficulty, and before the defendant had returned to the house, that 'Holland told him he was going after a gun and was coming back to kill him, and that he could not defend himself.' This was all hearsay evidence, and was not a part of the *res gestae*."

In *McCray v. State*, 134 Ga. 416 (68 S. E. 62, 20 Ann. Cas. 101), it is said in the syllabus:

"Declarations made by the deceased in reference to his motive in seeking to find the accused, though made while on his way to the scene of the homicide in quest of the accused, were not admissible, over the objection of the accused, for the purpose of showing that the intention of the declarant in seeking the accused was peaceful and lawful."

Another murder case was *State v. Shafer*, 22 Mont. 17 (55 Pac. 526). This excerpt is taken from the opinion:

"The court permitted witnesses to testify to declarations made by the deceased to them in the absence of the defendant, about 30 minutes before the homicide, that he (deceased) had had a difficulty with the defendant at Columbia Gardens that night; that he was not armed; that he was afraid of the defendant; that he wanted protection from the defendant; that he wanted defendant arrested, etc. It seems that this evidence was admitted for the purpose of showing deceased was not armed at the time he was shot by defendant. But we know of no theory upon which it was admissible.

It was not a part of the *res gestae*. It was clearly hearsay, and it was just as clearly error to admit it."

In *Wall v. State* (Tex. Cr. App.), 62 S. W. 1062, the defendant was convicted of murder in the second degree. He was the manager of a sawmill, and had discharged the decedent from employment there. The following morning the latter returned, and in the ensuing altercation the defendant killed him. We quote from the opinion:

"In bill of exceptions No. 1, appellant complains that the court permitted Jack Hall to testify that, on the morning Johnson was killed, he came to his house and told him he was going down to the mill to pay defendant what he owed him; that he intended to leave Hardin County, and did not want to leave until he had paid Wall what he owed him. And in this connection the witness further testified that, from what Johnson told him on the morning he was killed, witness had concluded that he (Johnson) and defendant had made friends after the difficulty the day before. Appellant objects to this testimony for various reasons, mainly because it shows the animus, purpose and intent of deceased, which purpose and intent were not brought home to the knowledge of appellant. * * In *Johnson v. State*, 22 Tex. App. 206 (2 S. W. 609), this exact question was raised and discussed, and we there held, where testimony was introduced for the purpose of showing that deceased had no deadly purpose or intent when he went to the place of the homicide and that he did not go there for the purpose of executing his prior threats against defendant, that such testimony was error, because it was hearsay evidence, so far as defendant was concerned; and, secondly, because defendant could not be bound by the undiscovered and undisclosed motive of deceased, when the same were opposed and contradicted by all the facts and circumstances known to and judged by defendant from his own standpoint."

Wooley v. State (Tex. Cr. App.), 64 S. W. 1055, was a murder case. The trial court admitted the testimony of witnesses about what the decedent said to them in the absence of the defendant just before the homicide, about his object in going into the defendant's field and his purpose in going from thence to one Griffith, who lived beyond the Wooley farm, to get employment. The objection to the testimony was on the ground that the defendant was not present at the time, and knew nothing as to the purpose disclosed in the conversation, indicating that the deceased was there on a peaceful mission. The court said:

"It is true, the testimony is *res gestae* of deceased's act; that is, his verbal act in connection with and explaining his conduct in being on the Wooley farm. But *res gestae* is not always admissible, especially where it makes proof of a fact that is bound to materially affect a defendant, and he has no notice or knowledge of such fact. The authorities cited all bear out appellant's contention to the effect that the testimony was inadmissible, and the court committed a harmful error in permitting its introduction."

To the same effect is *Adams v. State* (Tex. Cr. App.), 64 S. W. 1055; *Young v. State*, 41 Tex. Cr. Rep. 442 (55 S. W. 331); *State v. Rees*, 40 Mont. 571 (107 Pac. 893); *Brumley v. State*, 21 Tex. App. 222 (17 S. W. 140, 57 Am. Rep. 612); *Johnson v. State*, 22 Tex. App. 206 (2 S. W. 609).

In *People v. Williams*, 3 Park. Cr. Rep. (N. Y.) 84, the defendant and the decedent were husband and wife, and lived apart. He was accused of murdering her by administration of poison. For the purpose of showing that they were together, and hence that he had an opportunity to kill her, evidence offered of her declaration, on leaving her residence, that she was going to meet her husband, was immaterial, and not

part of the *res gestae*. The court there declared that the evidence was not offered to qualify an act connected with the issue, but to induce the jury to infer another act not otherwise shown to exist, that of his being in company with the deceased. In *Foster v. Shepherd*, 258 Ill. 164 (101 N. E. 411, Ann. Cas. 1914B, 572, 45 L. R. A. (N. S.) 167), it was held incompetent to receive the declarations of the decedent about where he was going to spend the night so as to account for his being where he was killed when mistaken for a burglar. In *Chicago etc. Ry. Co. v. Chancellor*, 165 Ill. 438 (46 N. E. 269), the action was brought against the company by an administrator, to recover damages for causing the death of his decedent. At the trial a witness was permitted to testify that she was at the house of the decedent between 7 and 8 o'clock in the morning in question, and that the latter told her she was going on the 9 o'clock train; that being the hour at which she was afterward killed. The question was material because the endeavor was thereby to show that she intended to become a passenger on that train. This materially affected the degree of care to be observed by the defendant, for if she was a passenger, the caution to be observed toward her was much greater than if she was not occupying that relation. The court held that her declarations about her purpose to take that train were inadmissible, although she went to the depot at that time and was there killed by the train. All these cases are illustrative of the attitude of the deceased toward the act in question, and are characteristic of his purpose in connection with the situation resulting in his death. The reasoning of these precedents is convincing that, in the absence of knowledge on the part of the defendant, the declarations of the decedent are entirely immaterial, are not part of the

res gestae, and cannot be admitted in evidence against the accused. In cases of circumstantial evidence, such things only serve to inflame the imagination, which always tinges that class of testimony. The declarations imputed to Edna Morgan, to the effect that she thought the defendant was coming, could not have been received in evidence if made by any other person at the same time and place. The fact that she is dead does not add to their admissibility or relevance.

13, 14. It has generally been held that the admission in evidence of material objects, or an inspection of the same, whether offered in evidence or not, is within the discretion of the court. We have before us, as an exhibit in the case, what purports to be a track of a man's shoe made in the soil near the barn. The earth was dug up with the track impressed thereon, was used in evidence, and is present here as an exhibit. It would not be far afield to characterize as capricious a discretion which would carry into the record a spade-full of barnyard filth and deny the jury an inspection of the feet of a horse upon whose track the prosecution relied as tending to connect the defendant with the crime. But, considering that the offer of the mare was made six months after the crime was committed, and there was no testimony tending to show that the foot was in substantially the same condition at both dates, we are not prepared to say that the court abused its prerogative in refusing the jury an inspection of the animal. On the other hand, if it had permitted an examination of her foot, no complaint whatever could have been made of such a ruling.

Regarding the correctness of the instructions on manslaughter, it is convenient as a preliminary to here set down the various provisions of the Criminal Code respecting the taking of human life:

"If any person shall purposely, and of deliberate and premeditated malice, or in the commission or attempt to commit any rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the first degree": Section 1893, L. O. L.

"If any person shall purposely and maliciously, but without deliberation and premeditation, or in the commission or attempt to commit any felony, other than rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the second degree": Section 1894, L. O. L.

"If any person shall, by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any design to effect the death of any particular individual, kill another, such person shall be deemed guilty of murder in the second degree": Section 1895, L. O. L.

"If any person shall, by previous engagement or appointment, fight a duel within the jurisdiction of this state, and in so doing shall inflict a wound upon another, whereof the person so injured shall die, such person shall be deemed guilty of murder in the second degree": Section 1896, L. O. L.

"If any person shall, without malice express or implied, and without deliberation, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, voluntarily kill another, such person shall be deemed guilty of manslaughter": Section 1897, L. O. L.

"If any person shall, in the commission of an unlawful act, or a lawful act without due caution or circumspection, involuntarily kill another, such person shall be deemed guilty of manslaughter": Section 1898, L. O. L.

"If any person shall purposely and deliberately procure another to commit self-murder, or assist another in the commission thereof, such person shall be deemed guilty of manslaughter": Section 1899, L. O. L.

"If any person shall administer to any woman pregnant with a child any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child,

unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter": Section 1900, L. O. L.

"If any physician, while in a state of intoxication, shall, without a design to effect death, administer any poison, drug, or medicine, or do any other act to another person which shall produce the death of such other, such physician shall be deemed guilty of manslaughter": Section 1901, L. O. L.

"Every other killing of a human being by the act, procurement, or culpable negligence of another, when such killing is not murder in the first or second degree, or is not justifiable or excusable as provided in this chapter, shall be deemed manslaughter": Section 1902, L. O. L.

On the postulate that it was allowable to instruct the jury on the subject of manslaughter only by the acquiescence of the defendant, his implied assent extended no further than to invite the court to correctly charge the jury on that topic. It is elementary that it is the duty of the court to declare the law and of the jury to report the fact by the verdict. The jury is not to be left to draw conclusions of law. That is the exclusive province of the court. The first instruction on manslaughter above quoted was founded upon Section 1898, L. O. L., but it left to the jury to determine the judicial question of whether the act, if any was shown, in the commission of which the defendant killed Edna Morgan, if at all, was an unlawful act. The second instruction was intended to cover the kind of manslaughter described in Section 1900. It is faulty in that it declares in substance that every abortion resulting in the death of the mother is a crime. Abortion means the premature or unnatural expulsion of the fetus from the uterus prior to the completion of the period of gestation. The Caesarian operation to

which resort is sometimes had for the purpose of saving the life of the mother is itself an abortion. It does not necessarily cause the death of the mother or the child, though it generally is the death of one or both. The term does not imply crime as was held in *Belt v. Spaulding*, 17 Or. 130 (20 Pac. 827). The instruction leaves out of consideration, not only the intent to destroy the child, but also the lack of necessity to preserve the life of the mother, both material ingredients of the crime condemned by Section 1900. If the court entered upon the task of explaining manslaughter in any of the various forms in the different sections of the statute already quoted, it should have correctly defined the offense. Its failure to do so in the instances mentioned renders the instructions amenable to the exception taken by the defendant at the close of the charge, although it might be said he consented that the court should charge the jury on manslaughter. The vice of the instruction lies in the assumption that bringing about an abortion is necessarily a crime, whereas it is only one element of an offense, the other ingredients of which were not mentioned or explained to the jury, but were taken for granted. The plea of not guilty and the presumption of innocence combat the indictment and all the testimony for the prosecution, so that, even if nothing else were shown, the court had no right to assume the other facts besides the mere abortion necessary to constitute an unlawful act or offense under Section 1900.

Still further: The following sections of Lord's Oregon Laws are here set forth:

“When it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only”: Section 1528, L. O. L.

"Upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the crime or any such inferior degree thereof": Section 1551, L. O. L.

"In all cases, the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime": Section 1552, L. O. L.

There is no crime in this state unless the same is defined by statute. In other words, there are no common-law crimes under our system of jurisprudence. Sanction must be found in some statute for every criminal accusation: *State v. Vowels*, 4 Or. 324; *State v. Gaunt*, 13 Or. 115 (9 Pac. 55); *State v. Nease*, 46 Or. 433 (80 Pac. 897); *State v. Ayers*, 49 Or. 61 (88 Pac. 653, 124 Am. St. Rep. 1036, 10 L. R. A. (N. S.) 992); *State v. Smith*, 55 Or. 408 (106 Pac. 797); *State v. Stephanus*, 53 Or. 135 (99 Pac. 428, 17 Ann. Cas. 1146); *State v. Smith*, 56 Or. 21 (107 Pac. 980). Murder is the only crime classified by degrees, and so we have murder in the first and second degrees as defined by statute. Manslaughter is not a degree of murder. All the six different kinds of manslaughter are unlike either murder in the first degree or murder in the second degree in essential particulars. The question of degrees, therefore, cannot be considered in this case under Section 1528, because there is no accusation for anything else than the lowest degree of murder as affected by Sections 1528 and 1551.

Under the present indictment, in order for the jury to be allowed to convict of manslaughter, we must hold that it is necessarily included in the terms of that accusation. We note that it says the defendant "wrong-

fully, unlawfully, feloniously, purposely and maliciously killed Edna Morgan in some manner and by some means unknown to the grand jury." We cannot say as a matter of law that any of the six different kinds of manslaughter is necessarily included within that statement. The indictment in hand does not measure up to the terms of Section 1440, L. O. L., which requires that:

"The indictment must be direct and certain, as it regards, * * the crime charged; and, the particular circumstances of the crime charged when they are necessary to constitute a complete crime."

"The particular circumstances" mentioned in the sections defining the several kinds of murder and manslaughter serve to differentiate one sort from another, and, being thus made necessary to constitute a complete crime, must directly and certainly appear in the indictment if a conviction is to be had on any of them. The principle at stake is whether a defendant can be committed of an offense of which the indictment gives him no information. True enough, the legislative branch of the government may simplify forms, but sufficient must be left in the accusing document to preserve and satisfy the constitutional rights of the accused: *State v. Learned*, 47 Me. 426; *State v. Mace*, 76 Me. 64. It is true that the forms in the appendix to our Code allow the allegation that the means employed to commit the crime are unknown to the grand jury; but in so far as that provision deprives the defendant of the right to know the nature and cause of the accusation against him it is unconstitutional. If the grand jury has not enough evidence to justify an indictment, so much the worse is it for the prosecution. No one can tell from the accusing document whether the defendant was to be tried for either of the two

classes of murder in the second degree described in Section 1894, or for the killing of a person by an act imminently dangerous to others, evincing a depraved mind, regardless of human life, as defined by Section 1895, or whether it was a homicide, committed while fighting a duel as condemned in Section 1896. Besides, it is impossible to say as a matter of law that either of the six sorts of manslaughter already mentioned is included in either of the four kinds of murder in the second degree. It is elementary that enough must be found in the indictment upon which to base a judgment of conviction. If it is proposed to convict of manslaughter under Section 1897, there should be sufficient in the written accusation to show that the defendant, without malice and without deliberation, but upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, voluntarily killed the deceased. Or, if the defendant was to blame for assisting the deceased to suicide, it should have been so stated, and likewise, as to the administering of any drug or employing any means upon a pregnant woman resulting in her death. This should appear in the indictment if the state would secure a conviction for that form of manslaughter. In short, the legislative branch of the government has seen fit to define six different classes of acts constituting manslaughter, and at least four constituting murder in the second degree, distinguishing them all as separate statutory offenses. The prosecution cannot be wiser than the lawmakers, obliterate all these points of difference, cast a dragnet in the form of a general indictment for murder, and be allowed to prove any one of the half dozen kinds of manslaughter or the four kinds of murder in the second degree. For arbitrariness such procedure excels

the well-known detective stratagem of apprehending the victim of some trivial charge and holding him until a graver case can be made out against him. It is to make conviction depend, not upon indictment which gives notice to the accused of what he is called upon to oppose by his defense, but upon what the prosecution may be able to fish out of testimony given in the star chamber of the grand jury. The true knowledge of "the nature and cause of the accusation" dawns not upon him until he has heard the instructions to the jury. The state does not come into the open and give its accused citizen notice of the charge against him; but, on the contrary, conceals its real purpose in generalities and sets a snare for his feet. In making the charge the grand jury must classify it according to the distinctions laid down by the statute. To hold otherwise is to abuse the constitutional right of the defendant "to demand the nature and cause of the accusation against him, and to have a copy thereof": Article I, Section 11, of the Constitution. To have a copy of the accusation means that the indictment upon which he is tried must state the facts covering the specific crime for which the state would secure a conviction. Within the terms of the organic act nothing less will conserve the rights of the accused under its protective feature or meet his constitutional demand. The prosecution is entitled to carve as great a crime out of any transaction as it can, but it is restricted under our Constitution and laws to that accusation to the exclusion of other different crimes except so far as one is necessarily included in the other. No other conclusion is logical, unless we entirely disregard Section 1442, L. O. L., saying, "The indictment must charge but one crime, and in one form only." It would mean that in crim-

inal pleadings we must discard all legislative distinctions between the various kinds of homicide and sweep into the scrapheap all rules about making an accusation conform to the statute. The form for murder in the first degree appearing in the appendix to the Criminal Code will answer for the "one form only," and no prosecutor need concern himself about setting out in his indictment any of the elements contained in the legislative definitions of other varieties of homicide.

Much reliance is placed by the prosecution upon *State v. Magers*, 35 Or. 520 (57 Pac. 197), where the matter is thus summed up:

"The rule to be extracted from these decisions seems to be that if the manner of the killing is unknown, and circumstantial evidence only is relied upon to connect the defendant with the commission of the crime, it is the duty of the court, when so requested, to instruct the jury upon the law applicable to murder in the first degree, murder in the second degree, and manslaughter, and where it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of these degrees only."

There are several reasons why that case should not control the present contention. There, the defendant sought to escape the death penalty by shunting the jury on to the subject of manslaughter. Here, the defendant is arguing against being called to meet a charge of which the indictment gave him no notice. That decision makes a manslaughter instruction depend upon the request of the defendant, but here the defendant did not ask for it. His attitude is portrayed in the words of his counsel, "I will nail my colors to the mast and sink or swim." His saying

at the same time, "We have no objection," cannot be construed into a request for such a direction to the jury. Again, the opinion takes no account of distinctions between different crimes and of the necessity of making an indictment conform to the statute, nor does it give any consideration to the constitutional right of the defendant already mentioned. It makes the broad statement that a manslaughter instruction should be given where and whenever circumstantial evidence is present in the case, but when we ask what one of the six different kinds of manslaughter must be described to the jury, we look in vain to the Magers' decision for an answer. Trial judges are left to conjecture on this subject. That precedent ignores the indictment as a foundation of conviction and permits the state to rely solely upon whatever theory may be developed in the testimony, irrespective of the form of the grand jury's accusation. In the instant case it would have been quite as proper to allow a verdict of arson, because there was evidence about the burning of a barn. Finally, the decision proceeded on a misapprehension of the statute, viz., that manslaughter is a degree of murder. It is, indeed, a species of homicide, but the Code has made it a distinct crime. It is not a degree of murder, nor a degree of any offense. Our legislation, without which there is no crime in this state, has made it *sui generis* in its several forms, and it should be so treated.

The court undertook to instruct the jury about the species of manslaughter defined in Section 1898, L. O. L., aimed against one who involuntarily kills another in the commission of an unlawful act or a lawful act without due caution or circumspection. The justification for this course must be found, if at all, in Section 1552, allowing the conviction of a crime,

the commission of which is necessarily included in the one charged in the indictment. The accusation is that the defendant did the act "purposely and maliciously." An act done "involuntarily" is not and cannot be included in the category of those done "purposely." The two words are antonyms. They are radically distinct and opposite in meaning. It is an abuse of the statute to say that involuntary homicide is necessarily, or in other words, as a matter of law, included in that done with purpose and malice. On this subject Mr. Justice EAKIN in *State v. Whitney*, 54 Or. 438 (102 Pac. 288), held the prosecution to a strict compliance with the statute in drawing an indictment. We read from the syllabus:

"An indictment, alleging that accused feloniously and voluntarily administered a suppository containing poison to another, from the effects of which she died, was insufficient, under Section 1897, L. O. L., making it manslaughter to voluntarily kill another upon a sudden heat of passion, but without malice and deliberation, in that it did not allege facts constituting voluntary manslaughter."

On the contrary he decided, further, that:

"An indictment alleging that accused feloniously and voluntarily administered poison to another, from the effects of which she died, did not charge involuntary manslaughter, under Section 1898, L. O. L., making it involuntary manslaughter to involuntarily kill another, while engaged in the commission of an unlawful act, or a lawful act without due caution, in that it did not allege facts showing any unlawful act, or a lawful act negligently committed."

The lesson to be drawn from that decision is that where the statute makes distinctions in the ingredients of a crime, the pleader must observe them.

To approve the instruction of the court about abortion, we would be driven logically to the absurdity of holding that when the accusation says the defendant "wrongfully, unlawfully, feloniously, purposely, and maliciously killed Edna Morgan," it perforce means that, she being then pregnant with a child, the defendant administered to her some drug or medicine, or used or employed upon her some instrument or other means with intent to destroy the child, the same being unnecessary to preserve the life of the mother, by reason of all which her death was produced. Such a conclusion does violence to the constitutional rights of the accused, because it does not inform him of the nature of the real charge against him, in that it leaves out every ingredient of the manslaughter described in Section 1900 except the death of the mother. Neither in the indictment nor in the charge of the court on that point is there a syllable about the administration of any drug or medicine, the employment of any instrument, or an intent to destroy the child, or lack of necessity to preserve the life of the mother. It would be a travesty on all rules of criminal pleading to say that an indictment, couched in the language of the court about abortion, would be a good one under Section 1900, yet that would be the effect of an approval of that instruction. The defendant was entitled to accept the issue as the state tendered it, and if he chose the pure alternative of guilty of murder in the second degree or not guilty, he had a right to do so and ignore any other charge. Under this indictment, drawn as it is without reference to the particular circumstances of the case showing how the homicide was accomplished, the pleading was not sufficient to support any evidence or conviction of manslaughter. It was error to enter

upon that field of inquiry. It exposed the defendant to danger of conviction from a course of which he had no notice, and invited the jury into the realm of fancy and speculation upon visionary theories with no testimony to support them.

Rayburn v. State, 69 Ark. 177 (63 S. W. 356), was a case where the defendant was charged with murder in that:

He "did unlawfully, willfully, feloniously, and of his malice aforethought, and after premeditation and deliberation, kill and murder one A. T. Carpenter."

Under this indictment the trial court charged the jury:

"If you find from the evidence beyond a reasonable doubt that defendant in the perpetration of, or in the attempt to perpetrate, the robbery of A. T. Carpenter, shot and killed Carpenter, then defendant is guilty of murder in the first degree, and you will so find."

The case was at first affirmed on appeal, but on rehearing it was reversed on this point. The Arkansas statute is substantially like our own. The case is so apropos in treating of statutory crimes that the following excerpt from the opinion is here inserted:

"According to these statutes two classes of murder constitute murder in the first degree, to wit: (1) All murder committed by any kind of willful, deliberate, malicious and premeditated killing; and (2) all murder which shall be committed in the perpetration of, or in the attempt to perpetrate, arson, rape, robbery, burglary or larceny. In *Cannon v. State*, 60 Ark. 564 [31 S. W. 150, 32 S. W. 128], this court held that it is essential to the validity of an indictment for the first class of murder in the first degree to use the words 'willful,' 'deliberate,' 'malicious,' 'premeditated,' or equivalent words, in charging the offense. The reason for the ruling is, these words are descriptive of the elements necessary to constitute that class

of murder. For the same reason it is necessary to allege that the killing was done in the perpetration of, or in the attempt to perpetrate, one of the felonies named in the statutes quoted, in order to charge the second class of murder in the first degree. These two classes of murder in the first degree are separate and distinct. In the former a precedent intent to kill is necessary to constitute the offense, while in the latter it is not. While the former may be committed in the perpetration of or attempt to perpetrate, the felonies named, an indictment for the same will not always include the latter; and when it does, it is only because the essentials necessary to constitute the former exist. The perpetration of, or attempt to perpetrate, a felony necessary to constitute the second class is not equivalent to the premeditation, deliberation and intent necessary to constitute the first, except in effect. They raise the killing to the grade of that in the first class, but the allegations necessary to charge murder in the first degree in the first class are not equivalent to those necessary to charge the offense in the second. Hence an indictment which charges only the offense in the first class will not be sufficient to accuse the defendant of murder committed in the perpetration of, or in the attempt to perpetrate, one of the felonies named in the statute, unless it is committed with the intent to kill, and after premeditation and deliberation. In support of this conclusion we cite *Cannon v. State*, 60 Ark. 564 [31 S. W. 150, 32 S. W. 128], and the cases and authorities cited in the same. A defendant cannot be lawfully convicted of a crime with which he is not charged in the indictment against him. Some courts have held that he can be convicted of murder committed in the perpetration of, or in the attempt to perpetrate, the felonies named in the statute, under a common-law indictment for murder. But they do so because they hold that the law dividing murder into two degrees introduced no change in the form of the indictment, created no new offense, and only reduced the punishment for one of the degrees. We disapproved of this view in *Cannon v. State*, 60 Ark. 564 [31 S. W. 150,

32 S. W. 128], and held that it did make a change in the form of the indictment. It follows the instruction should not have been given."

Woods v. Commonwealth (Ky.), 7 S. W. 391, was a murder case. The statute there, as in this state, defined a peculiar kind of homicide as manslaughter when perpetrated under certain circumstances. The court there held that:

"The statutory crime, as defined in Gen. Stats. Ky., c. 29, art. IV, § 2, as follows: 'Any person who shall stab another, not designing thereby to produce his death, and which is not done in self-defense, or in an attempt to preserve the peace, or in the lawful arrest or attempt to arrest a person charged with a felony, or in doing any other legal act, so that the person stabbed shall die thereof within six months next thereafter,' etc.—is not a degree of the offense charged in an indictment for murder; and an instruction as to the crime defined by this statute cannot be given in such a case.'"

To the same effect is *Conner v. Commonwealth*, 76 Ky. (13 Bush) 714. In *Norris v. State*, 33 Miss. 373, it was held that under a general indictment for larceny of property the state cannot show that the theft was committed in another state, and brought into the domestic forum, so as to punish the defendant under a special statute making that larceny.

In *Huntsman v. State*, 12 Tex. App. 619, Mr. Justice HURT considers exhaustively the matter of a lesser crime being included in a charge of one of greater consequence. Among other things, he says:

"Can the legislature remove any of these incidents? If so, which, and how many? If it can authorize omission of one, why not two, three, four or all of them? If it can provide for the omission of a single necessary ingredient in the description of the offense charged, it can authorize the omission of all words

descriptive of the act or omission, which, by law, is declared to be an offense. Thus it might provide for a trial of a citizen upon a written statement of a grand jury, accusing him of having violated the law, and authorize the prosecution to prove, on the trial, any act or omission violative of any provision of the written law. But it was for the purpose of preventing such unjust and tyrannical legislation and its consequences that the requirement of 'an indictment of a grand jury' was inserted in the Constitution. Were it otherwise, the grand jury might indict for theft upon a state of case sufficient, as presented to them, to warrant the charge, and on trial the defendant show his innocence of such offense, yet the prosecution could abandon that accusation and go on trying to establish embezzlement, swindling, receiving stolen goods knowing them to be stolen, obtaining property upon false pretenses, and, if in relation to live animals, driving them beyond their accustomed range; taking the chances of making a *prima facie* case of either or all of them, and so procure a conviction for an offense which the grand jury never heard of during their investigation, and for which they had no thought of indicting the accused. Thus the indictment presented would be made the mere stalk or stub on which the prosecution might seem least liable to be met, or, of which there might be the greatest probability of the defendant's having no information, so as to insure his conviction before he could prepare to answer. Such a construction would make the right not to be 'held to answer for any criminal offense except upon indictment of a grand jury' a deception, a fraud, a falsehood, to intrap innocent persons who confide in the truth of the law and its solemn proceedings, and to wrongfully convict them without any indictment of a grand jury, charging them with the crime for which they are held to answer. There must be such an indictment, so accusing the defendant of the very crime of which he is convicted, to sustain the judgment, and the want of it will not be supplied by one charging another offense

by allegations which do not include that for which the party is convicted."

He sums up the matter thus:

"Finally: To allow the indictment for a greater to sustain a conviction for the lesser offense, it must contain the statement of every inculpatory fact and circumstance material to the description of the latter, and the two must be alike as to all the essential constituent elements of the lesser offense, so that the allegation will include it without contradicting the material averments of the greater. Whenever an indisputable constituent fact or circumstance of the lesser is not included in the greater, the latter cannot be made to include the former, no matter how many other facts and circumstances may be common to both."

In *People v. Olmstead*, 30 Mich. 431, the indictment was for manslaughter in killing one Mary Bowers, whom it is averred he did "feloniously, willfully, and wickedly kill and slay, contrary to the statute in such case made and provided," etc. The information did not name the offense, nor the manner, nor the means of its commission. The statute for manslaughter by producing abortion was substantially like our own. The court admitted to the jury considerable testimony designed to prove the offense thus described. The discussion of this point is contained in the following extract from the opinion:

"Respondent claims that the constitutional right 'to be informed of the nature of the accusation' involves some information concerning the case he is called on to meet, which is not given by such a general charge as is here made. And courts are certainly bound to see to it that no such right is destroyed or evaded, while they are equally bound to carry out all legislative provisions tending to simplify practice, so far as they do not destroy rights. The discussions on this subject sometimes lose sight of the principle

that the rules requiring information to be given of the nature of the accusation are made on the theory that an innocent man may be indicted, as well as a guilty one, and that an innocent man will not be able to prepare for trial without knowing what he is to meet on trial. And the law not only presumes innocence, but it would be gross injustice unless it framed rules to protect the innocent.

“The evils to be removed by the various acts concerning indictments consisted in redundant verbiage, and in minute charges, which were not required to be proven as alleged. It was mainly, no doubt, to remove the necessity of averring what need not be proved as alleged, and therefore gave no information to the prisoner, that the forms were simplified. And these difficulties were chiefly confined to common-law offenses. Statutory offenses were always required to be set out with all the statutory elements: *Koster v. People*, 8 Mich. 431. The statute designed to simplify indictments for statutory crimes, which is in force in this state, and is a part of the same act before quoted, reaches that result by declaring that an indictment, describing an offense in the words of the statute creating it, shall be maintained after verdict: C. L., § 7928. But both of these sections must be read in the light of the rest of the same statute, which plainly confines the omission of descriptive averments to cases where it will do no prejudice. And so it was held in *Enders v. People*, 20 Mich. 233, that nothing could be omitted by virtue of this statute, which was essential to the description of an offense.

“Manslaughter at common law very generally consisted of acts of violence, of such a nature that indictments for murder and manslaughter were interchangeable, by the omission or retention of the allegation of malice, and of the technical names of the offenses. In a vast majority of cases a very simple allegation would be enough for the protection of the prisoner. But where the offense of manslaughter was involuntary homicide, and involved no assault, but arose out of some negligence or fault from which

death was a consequential result, and sometimes not a speedy one, the ordinary forms were deficient, and the indictment had to be framed upon the peculiar facts, and could convey no adequate information without this: See 2 Bishop, Cr. Proc., § 538.

"The offense for which the respondent in this case was put on trial originated in the statute defining it, and could not have come within any of the descriptions of manslaughter at common law. An innocent person, charged under the information, could form no idea whatever from it of the case likely to be set up against him. He might, perhaps, be fairly assumed bound to prepare himself to meet a charge of manslaughter by direct violence or assault. By which one was meant, out of the multitudinous forms of indirect and consequential homicide that might occur after a delay of any time not exceeding a year, from an original wrong or neglect, and of which he might or might not have been informed, he could not readily conjecture. Nothing could inform him of this statutory charge, except allegations conforming to the statute. These we think, he was entitled to have spread out upon the accusation. Without them he was liable to be surprised at the trial, and could not be expected to prepare for it. We are not prepared to hold this information bad upon its face, for we are disposed to think, and it was practically admitted on the argument, that it may apply to the ordinary homicide by assault. It was not, therefore, until the evidence came in that it was made certain the case was different. The question of sufficiency does not arise directly upon the record, but on the bill of exceptions, and the error was in permitting a conviction on it."

In *People v. Arnett*, 126 Cal. 680 (59 Pac. 204), it was held that under an indictment charging assault to commit murder, but which does not charge that the defendant made the assault with a deadly weapon, the conviction of the lesser offense cannot be sustained. In *Mapula v. Territory*, 9 Ariz. 199 (80 Pac. 389), it was decided that a conviction of aggravated assault may be

had under a murder indictment only after the facts constituting such assault are alleged in the indictment. *Goldin v. State*, 104 Ga. 549 (30 S. E. 749), laid down the principle that a verdict, finding a defendant guilty of assault and battery under an indictment charging assault with intent to commit rape, under which no battery is charged, cannot stand. Again, in *Watson v. State*, 116 Ga. 607 (43 S. E. 32, 21 L. R. A. (N. S.) 1), the court announced the doctrine that the crime charged in the indictment must necessarily include all the elements of the lesser crime, or the indictment must itself set them out by appropriate averments. *State v. Desmond*, 109 Iowa, 72 (80 N. W. 214), declares that to justify a conviction of assault and battery under an indictment charging assault with intent to commit rape, it must be averred in the indictment that the attempt was accompanied with actual violence. It is taught in *People v. Adams*, 52 Mich. 24 (17 N. W. 226), that in a trial for murder not charged to have been committed with assault, a conviction of assault is erroneous. It was held in *Alyea v. State*, 62 Neb. 143 (86 N. W. 1066), that a conviction of assault and battery is improper under an information, charging an assault with intent to inflict great bodily harm, where the averments do not include a battery.

In *State v. Thomas*, 65 N. J. Law, 598 (48 Atl. 1007), there was an indictment for manslaughter, which charged only that the defendant did "feloniously kill and slay" the deceased, and it was held that a conviction for assault and battery could not be supported. After reciting certain excerpts from previously decided cases the court says:

"These expressions are in harmony with our constitutional Bill of Rights that in all criminal prosecutions the accused shall have the right to be informed of

the nature and cause of the accusation, a provision similar to that which the Supreme Court of Massachusetts declared to be only 'an affirmation of the ancient rule of the common law that no one shall be held to answer to an indictment or information unless the crime with which it is intended to charge him is set forth with precision and fullness.' * * Hence the most that can be said of the present indictment on this point is that it charges an offense of which assault and battery may or may not be an ingredient. Such an accusation does not distinctly and precisely inform the accused that he is charged with this lower misdemeanor, as is required by the authorities cited. At best, the charge is equivocal and inferential only."

The Indiana statute on the requisites of an indictment as set out in *State v. Lay*, 93 Ind. 341, is almost precisely like the Oregon Code on that subject. The decision accords with the doctrine laid down by Mr. Justice EAKIN in *State v. Whitney*, 54 Or. 438 (102 Pac. 288). Mr. Justice HAMMOND there said:

"Section 1908, *supra*, defines two offenses, namely, voluntary manslaughter and involuntary manslaughter. In the former the killing is done intentionally, but without malice, express or implied, and upon sudden heat. In involuntary manslaughter the killing, done in the commission of some unlawful act, is unintentional. An indictment for voluntary manslaughter will not support a conviction for involuntary manslaughter, and *vice versa*: *Bruner v. State*, 58 Ind. 159; *Adams v. State*, 65 Ind. 565. Though the penalty is the same in both, the crimes of voluntary and involuntary manslaughter are as separate and distinct as those of gross larceny and robbery. In determining the sufficiency of an indictment or information for manslaughter, all the sections of the statute above set out must be construed together. * * In manslaughter the indictment or information must now, as heretofore, be sufficient to charge one or the other offense of voluntary or involuntary manslaughter. The indictment in the case before us is not sufficient to charge either

offense, and under the fourth clause of Section 1759 is bad for uncertainty."

In *State v. McAvoy*, 73 Iowa, 557 (35 N. W. 630), it was held that the crime of assault and battery is not necessarily included within the assault to commit rape and to justify a conviction of the lesser offense. Under such an indictment it must be averred that the attempt was accompanied with some actual violence to the person of the woman. The court there said:

"But the defendant can be convicted of an offense distinct from the one specifically charged in the indictment only when such offense is an essential element of that charge, or when it is shown by proper averment in the indictment that a minor offense was in fact included in the perpetration of the one charged."

In *Scott v. State*, 60 Miss. 268, it is stated that a statutory indictment for murder does not embrace a charge of assault and battery with intent to murder. The court said:

"A party can only be convicted of a lesser offense than the one charged where the lesser is specifically charged as constituting part of the higher, or by an added count, where the lower is necessarily included in the higher."

These precedents would seem to dispose of the theory that an assault is necessarily involved in the allegations of the indictment before us so as to justify the instruction of the court on the subject of abortion. Moreover, the court did not undertake to instruct on assault, even if we could torture the indictment into an inclusion of that element. The trial judge invited the jury to convict the defendant of a crime of which the indictment gave him no notice whatever, and in so doing violated a constitutional right established from the beginning of jurisprudence in this country. Our

statute has undertaken to make certain groups of wrongful acts, and to apply to each one the term of manslaughter, although they are radically different from each other, containing only the common element of the death of a person. More than this, the legislature has provided forms of indictment perpetuating the distinction between these different classes of specifications. All these things are for the protection of the liberty of the citizen. It is said in Section 1439, L. O. L.:

“The manner of stating the act constituting the crime, as set forth in the appendix to this Code, is sufficient, in all cases where the averments there given are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit.”

It thus imposes a duty upon the prosecuting officer in drawing his indictment to differentiate in allegation as required by the Code, and he cannot avoid this injunction by using an indefinite omnibus form, which does not notify the defendant of the particular circumstances of the crime charged. The contrary authorities are based on the doctrine that the common-law form of indictment for murder is sufficient for any charge involving homicide. These precedents are not applicable in this state, for it has been often held that there are no common-law crimes here. We must depend entirely upon our statute for the punishment of any offense. If the differences between the various kinds of murder in the second degree and of manslaughter were not to be observed, why did the legislature put them upon the statute-book and also prescribe forms indicating that the distinction should be carried into the indictment? The law-making power has provided these things for the protection of the

liberty of the citizen, and his rights are materially abused unless the injunction is observed.

Undoubtedly, a most untimely death of a young woman has occurred under circumstances where vengeance, as distinguished from the orderly administration of the law, cries aloud for a victim. But the Constitution, supreme over all of us, and the statutes in pursuance thereof have provided certain guaranteed rights for the accused which have been disregarded. In brief, there are these errors clouding the proceedings in the Circuit Court: (1) The admission of hearsay, detailing a statement of Edna Morgan about her thought concerning the possible future movement of the defendant, thus letting in an utterance of hers which she would not have been permitted to narrate if she had lived and had been called as a witness, because it was not made in the presence or knowledge of the defendant or by his authority. (2) The faulty instruction of the court, wherein it was assumed that abortion alone was a crime, without stating the other elements of the offense defined by Section 1900, L. O. L. (3) Charging the jury about forms of manslaughter of which no intimation was given to the defendant by the indictment upon which he was tried. The evidence was all circumstantial, and that on behalf of the defendant strongly controverts the contention of the prosecution. The danger of a wrong conviction on circumstantial evidence is very great. Under these conditions, as we did in *State v. Rader*, 62 Or. 37 (124 Pac. 195), we ought to reverse the conviction, and remand the case for the decision of a jury on a new trial.

Motion to dismiss appeal argued November 1, appeal dismissed December 19, 1916.

STANFIELD v. MAHON.

(161 Pac. 561.)

Appeal and Error—Statute Relating to Time of Taking Appeal—When Appeal will be Dismissed.

1. Under Section 201, L. O. L., providing that upon a jury trial, judgment in conformity with the verdict shall be entered by the clerk on the day the verdict is rendered, Section 548, as amended by Laws of 1911, page 195, providing that a motion for a new trial shall not stay the six months' time formerly limited in which to take an appeal until the motion was determined, and that the appeal to be effectual must be taken within six months from the entry of judgment, and Section 550, as amended by Laws of 1913, page 617, Section 1, subdivision 5, requiring an appeal to the Supreme Court to be taken within 60 days from the entry of the judgment appealed from, an appeal to the Supreme Court must be taken within 60 days from the original entry of judgment, when a motion for new trial is not granted, and otherwise the appeal will be dismissed.

From Harney: DALTON BIGGS, Judge.

In Banc. Statement PER CURIAM.

This action of replevin by R. N. Stanfield against James Mahon was tried and on the eleventh day of April, 1916, a finding was made as follows:

"We, the jury impaneled and sworn to try the above-entitled case, find for the defendant, and that defendant was entitled at the commencement of this action to the immediate possession of the 147 head of sheep mentioned in the complaint as security for the payment of the amount of damage done to defendant's land described in the answer and also for the reasonable care of said sheep while being so held by him, and we assess the damage, and expense in the sum of \$400, and find that defendant had a special interest and property right in said sheep to the extent of the aforesaid amount; we also find that the value of the said 147 sheep was \$624.75, and that the defendant is entitled to the return of said sheep."

Judgment was entered in the journal on the day the verdict was returned. The plaintiff's counsel served and filed a notice of appeal on the twenty-second day of June, 1916, and thereafter gave the required undertaking and caused a transcript to be filed in this court. The defendant's counsel move to dismiss the appeal because it was not taken within 60 days from the time the judgment was given as provided by law: Laws 1913, p. 617, subd. 5. APPEAL DISMISSED.

Mr. J. W. Biggs and *Mr. G. A. Rembold* submitted a brief without argument for the motion.

Contra, there was a brief submitted over the names of *Mr. Lionel R. Webster* and *Mr. P. J. Gallagher*, with an oral argument by *Mr. Webster*.

Opinion PER CURIAM.

Resisting the motion, the plaintiff's counsel filed an affidavit showing that when the verdict was found a motion was made to set it aside and for a new trial; that this application was taken under advisement by the court and it was tacitly agreed between counsel for the respective parties that no judgment should be entered or execution issued until the motion for a new trial was determined; that by reason thereof the affiant believed the judgment would not be entered until it was decided whether or not a new trial would be granted; that on the twenty-second day of May, 1916, he examined the court records and found the judgment had not been docketed; that some time later he learned from the judge that inasmuch as 60 days had about elapsed since the application for a new trial was made, the latter would allow the statute of limitations

to overrule the motion, and as soon as possible thereafter the notice of appeal was served and filed; that examining the docket and finding no judgment had been entered the affiant relied upon the implied agreement and was surprised to find that the judgment had been entered in the journal on the eleventh day of April, 1916, but not noted in the judgment docket until the twenty-second day of June, 1916, and then as of the eleventh day of April, 1916.

The counter-affidavit of defendant's counsel is to the effect that when the verdict was returned, the court upon their motion immediately gave judgment which was thereupon entered in the journal; that no agreement, express or implied, was made that the entry of the judgment should be delayed; and that the only understanding reached was that execution should not immediately be issued, but that a reasonable time would be allowed to pay the judgment.

When a trial has been had by jury, judgment shall be given by the court in conformity with the verdict and so entered by the clerk within the day on which the verdict is returned: Section 201, L. O. L. Section 548, L. O. L., which enactment was incorporated as Section 547, B. & C. Comp., was amended so as to provide that a motion for a new trial should not operate as a stay of the 6 months' time formerly limited in which to take an appeal until the motion was determined, but that the appeal to be effectual must be taken "within 6 months from the date of the original entry of judgment": Laws 1911, p. 195. Section 550, L. O. L., was subsequently amended so that an appeal to the Supreme Court should be taken "within sixty (60) days from the entry of the judgment, order or decree appealed from": Laws 1913, p. 617, subd. 5.

In construing these provisions it has been held that an appeal to this court must be taken within 60 days from the original entry of the judgment, when a motion for a new trial is not granted; *Barde v. Wilson*, 54 Or. 68 (102 Pac. 301); *Macartney v. Shipherd*, 60 Or. 133 (117 Pac. 814, Ann. Cas. 1913D, 1257); *Gearin v. Portland Ry., L. & P. Co.*, 62 Or. 162 (124 Pac. 256); *Hahn v. Astoria National Bank*, 63 Or. 1 (114 Pac. 1134, 125 Pac. 284); *Tucker v. Davidson*, 80 Or. 254 (156 Pac. 1037). Assuming, without deciding, that parties to a suit or an action could by agreement extend the limitation prescribed by statute for taking an appeal from a judgment or decree, which enactment relates exclusively to a matter of jurisdiction of this court, the alleged tacit agreement relied upon by plaintiff's counsel is denied by counsel for the adverse party, except in respect to their promise not to issue execution until a reasonable time to pay the judgment had elapsed. No conclusive showing has been made by plaintiff's counsel to take this case out of the general rule referred to, and as more than 60 days had elapsed from the time the judgment was entered in the journal until the notice of appeal was served and filed, no jurisdiction of the cause was obtained by this court.

The appeal is therefore dismissed.

APPEAL DISMISSED.

Argued October 31, affirmed December 19, 1916.

BLACKWELL v. OREGON SHORT LINE RY. CO.

(161 Pac. 565.)

Carriers—Delay in Transporting Livestock—Evidence.

1. Evidence in an action for delay in transporting livestock, *held* to sustain a finding that the cattle were ready to be loaded, in accordance with an arrangement with the carrier, at the time of the departure of the train.

Carriers—Shipping of Livestock—Delivery to Carrier.

2. A shipper and the carrier may make such stipulations upon the matter of delivery to the carrier as they see fit, and when so made they are to govern.

Carriers—Shipping of Livestock—Notice of Delivery to Carrier.

3. Where the station agent and conductor of a common carrier were informed the day before an intended shipment that the cattle were to be put into the pens for shipment according to custom, no further formal notice was necessary.

Carriers—Shipping of Livestock—Acceptance of Shipment.

4. Where, in accordance with a recognized custom, a shipper notified the railroad company that he intended to ship a certain number of cattle next day, and had them ready to be loaded upon the arrival of the train, such acts, known to the carrier and not objected to, constituted a delivery and an acceptance of the shipment; no written receipt or bill of lading being necessary.

Carriers—Shipping of Livestock—Liability.

5. The liability as common carrier begins with the actual delivery of the goods for transportation, and not merely with the formal execution of a receipt or bill of lading.

Carriers—Shipping of Livestock—Delay—Evidence.

6. In an action for damages for delay in transporting a shipment of livestock, evidence as to its market value at destination and of shrinkage per head *held* admissible; the value at the point of shipment and at destination being concededly the same except for the shrinkage.

Carriers—Carriage of Livestock—Delay—Damages.

7. In an action for damages through delay in transporting a shipment of livestock, an instruction that the measure of damage would be the depreciation in the value of the animals caused by the negligent delay *held* proper.

Carriers—Delay in Shipment—Actions—Parties.

8. Where the agent of a common carrier is joined as defendant in a suit for damages for delay in a shipment of livestock, but no cause of action is stated against him, and instructions are given as though

the carrier were the sole defendant, his name should be stricken from the judgment.

[As to liability of carriers of livestock for loss or injury, see note in 130 Am. St. Rep. 432.]

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

Plaintiff, N. Y. Blackwell, instituted this action against the Oregon Short Line Railway Company, a corporation, and Louis P. Delsole, for the recovery of damages alleged by him to have been sustained from the asserted delivery to the carrier at Juntura, Oregon, of 197 head of cattle at about 8 o'clock on the morning of September 16, 1915, and the carrier's failure to transport them from Juntura on the defendant's regular train, which it is averred left there after the stock had been delivered to the carrier. The allegation of the complaint in that respect is in substance that at about 8 o'clock A. M. on the above-named date the plaintiff delivered to the defendants, and they received and accepted from him, the said cattle to be by the defendant Oregon Short Line Railway Company transported from Juntura to Hope, in Malheur County, Oregon, within a reasonable time, which is from 2 to 5 hours. It is thereupon alleged that the carrier failed to transport the cattle within a reasonable time, but that they were held in the company's pens at Juntura until the following morning, when they went forward on the regular morning train, that by reason of such failure to carry and deliver said cattle and to care for them they were reduced in flesh, weakened and made unfit for market, to plaintiff's damage in the sum of \$1,500.

The railway company denied that the cattle were delivered at 8 o'clock A. M. on September 16, 1915, or before the morning of September 17th, when 7 car-

loads of stock were received and transported from Juntura to Hope, Oregon. It also denied any damages. The cause was tried by the court and a jury, and a verdict found for the plaintiff. From a following judgment for \$933.44, the defendants appealed.

A brief outline of the case, which the evidence tended to prove, is as follows. The plaintiff is a dealer in livestock, and has followed that business for several years, shipping both to eastern and coast markets. During the season of 1915 he was engaged for a part of the time in shipping cattle out of Juntura, Oregon, over the road of the defendant Oregon Short Line Railway Company. Prior to the shipment complained of he had made one or two similar shipments, and had ordered cars for the transportation of the cattle in question, which cars the company had ready at Juntura. The plaintiff was buying these cattle by weight, the drovers bringing them in, holding them outside the yards one night, and weighing them the next morning. On the day prior to that on which plaintiff alleges he made delivery, plaintiff informed Delsole, the agent for the railway company at Juntura, that he would be ready on the following morning to ship 7 cars of cattle on the regular train. Plaintiff was instructed by Delsole to have his cattle at the yards at about 8 o'clock A. M., as the train would be in about that time. Following these instructions the plaintiff secured the assistance of several parties and had the cattle in the stockyards when the train backed up to load. Another shipper, William Jones, had 2 cars of cattle in the yards when the plaintiff arrived with his cattle, having put them in the night before, and they were then in the loading chutes. When the train came in plaintiff had his cattle close to the corral and before it backed up to the stockyard to load Jones' cattle, he

had his in the pens. Before placing them there he cut out a portion of 37 head of feeders that did not have to be weighed, putting them in a separate pen preparatory to loading. Upon getting the cattle into the pens he and part of his men proceeded with dispatch to weigh the remaining 160 head, which were beef cattle. Some considerable time after the train backed down to the stockyards the railroad men and Mr. Jones proceeded to load his 2 cars. The conductor stated that when this was accomplished he asked plaintiff when he would be ready to load, and was told that it would take some time. This, however, is denied by the plaintiff. The conductor states that afterward he made the same inquiry of a man who was helping to cut out the cattle, and he was told that it would be 2 or 3 hours. The evidence tended to show further that thereupon the conductor took his engine and proceeded to the station; that he returned in a short time, picked up the 2 cars of Mr. Jones' cattle, and, without further investigation as to whether or not the plaintiff was ready to load, placed the 2 cars of Jones' stock in the train, and before plaintiff was aware of it left the station at about 9 A. M. At this time there were about 3 cars of plaintiff's cattle ready to load, consisting of 1½ or 2 cars of beef cattle, and the 37 head of feeders, and a sufficient number of men on hand to attend to the loading. Plaintiff finished weighing the cattle at 9:30 or 9:35 A. M. Upon ascertaining that the train had departed, he immediately telegraphed to an officer of the defendant corporation, stating that his stock had been left in the yards, and requested "power" with which to move them, also stating that unless defendant could furnish equipment, the cattle were at the disposal of the company. He waited all day for an

answer, making inquiries of the agent regarding the same but receiving none. The service on this branch railroad consists of one train a day each way, a mixed train carrying passengers, freight, baggage, mail, express and such livestock as there is for shipment at the various stations along the line. It was the custom of the defendant company to wait upon shipments until all the livestock tendered for shipment at the various stations along the line could be loaded, waiting in some instances several hours. Sometimes the train was delayed until the afternoon before departing from Juntura. Defendant's agent stated that in the neighborhood of 1,000 cars of livestock were shipped over this branch during the shipping season of 1915, and that this tonnage was handled by this single train, except in a few instances, when special ones were run. Plaintiff's cattle were in the yards without feed for more than 24 hours, and upon arrival of defendant's train on the following morning, September 17th, were loaded in 25 minutes and shipped out at about 9:30 o'clock A. M. The shrinkage was about 100 pounds to the head, and the value of the cattle at Juntura was 5.75 or 6 cents a pound. It appears from the evidence that the damage caused by the failure to ship the cattle within a reasonable time was from \$5 to \$10 a head, and that while the cattle were in the yard waiting the railway company furnished them water, but no feed.

On behalf of the defendant company, Mr. Delsole testified that Blackwell had shipped cattle on the 15th of that month, and that the train was held 2 hours; that on that day he informed Blackwell that he would have to have his cattle in the next morning at about 8 o'clock; that he did not get them in by that time nor by the time the train arrived; that when the train

came back to the station after the cars containing Jones' cattle were attached, he told the dispatcher it would be $1\frac{1}{2}$ or 2 hours before Blackwell would be ready to load. The dispatcher answered instructing them that the train should not wait. He said that they never left stock when they were ready to be loaded.

AFFIRMED.

For appellants there was a brief over the names of *Mr. H. B. Thompson*, *Mr. George H. Smith* and *Mr. William E. Lees*, with an oral argument by *Mr. Thompson*.

For respondent there was a brief with an oral argument by *Mr. P. J. Gallagher*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. It is candidly stated in defendants' brief as follows:

"The basic question, therefore, so far as the railroad company is concerned, was whether the plaintiff delivered and the defendant received the cattle at about 8 o'clock on the morning of the day in question and before the departure of the morning train, * * and if the cattle were delivered before the departure of that train it was the duty of the carrier to take them out then, that being the only scheduled train on the branch as provided by the published and filed schedule."

It will be seen that there was a sharp conflict in the evidence as to the preparedness for the shipment of the cattle in question at the time of the departure of the train. The testimony on the part of the plaintiff tended to show, and the jury found, that when the train arrived at Juntura the cattle were near by the stockyard of the defendant where the men were cutting out the feeders as it was a better place for such

work than in the yards; that they were in the yard when the train backed up to load the Jones cattle; and that when the latter were loaded and out of the way, Blackwell had about 3 cars of his cattle ready to load, and, except for some misunderstanding caused probably on account of strained diplomatic relations between Blackwell and the defendant's servants, would have commenced to load the cattle into the cars while other men weighed the remainder, so that there would have been but a few of the cattle left to load when the weighing was completed at about 9:30 o'clock, and the train would not have been delayed on account of loading the Blackwell cattle any appreciably longer time on that day than it was on the following day when they were loaded in 25 minutes. It appears that Juntura is a small station on this branch line, and that the railway company did not maintain a yard, nor provide any means for placing the cars for loading cattle until the regular daily train arrived, and did not expect the stock to be loaded in advance of its arrival. There were 7 carloads of plaintiff's animals, and they could not all be loaded at once. The loading chute held but one car, and if they were loaded and transported at all, under the prevailing conditions, the daily train must be held to afford a sufficient length of time for so doing. The jury found according to the theory of the plaintiff, and this must be assumed to be the true one. It was not the theory of the defendant, as indicated by the evidence, that it would have disarranged the train schedule and prevented the regular connection for the railroad men to have devoted 35 or 40 minutes to the loading of plaintiff's cattle on the 16th, but that it would be 1½ or 2 hours before Blackwell would be ready to commence loading. The jury did not find the condition as

claimed by the servants of defendant to exist. It could fairly find from the evidence that when defendant's train left Juntura plaintiff's cattle were, for all practical purposes, ready to be loaded upon the cars; that plaintiff had made arrangements with defendant through its agent to have the cattle there at about 8 A. M. on that morning; and that he complied with the requirements of the railway company in this respect.

The conditions on the branch line of the defendant railway are different from those upon which the opinion was based in *Cohen v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 162 Wis. 73 (155 N. W. 945), cited by defendants, where plaintiff requested a fast stock train to wait for livestock which was not loaded into the cars but which should have been loaded before the train arrived.

2. It is deduced from the general rules in 4 R. C. L., Section 409, page 951, that a common carrier is bound to accept and carry livestock that is tendered to it for shipment in good condition. As to the delivery for shipment we find in the notes to *Norfolk & W. R. Co. v. Harman & Crockett*, 91 Va. 601 (22 S. E. 490, 50 Am. St. Rep. 85, 44 L. R. A. 290, 292), the following rules:

“The duty of a carrier of livestock to receive, transport, and deliver it is not fully discharged unless the carrier makes provision at the place of loading to properly receive and load the stock, and provision at the place of unloading to properly deliver the stock to the consignee: *Covington Stockyards Co. v. Keith*, 139 U. S. 128 (35 L. Ed. 73, 11 Sup. Ct. Rep. 469).”

“And the refusal of a railroad company to ship cattle from a station after they had been delivered according to the terms of the contract of shipment at stockyards of the company at that station and placed in such stockyards relieves the shipper from the neces-

sity of making any further delivery or offer to deliver: *Louisville N. A. & C. R. Co. v. Godman*, 104 Ind. 490 (4 N. E. 163)."

In the present case the general rule is subject to the conventional arrangements made between Blackwell and the agent of the railway company on the previous day, to the effect that plaintiff should have his cattle there at the stockyard at Juntura ready to load at about 8 A. M. on September 16, 1915, when the train came in and was ready to receive them: *Lackland v. Chicago & A. R. Co.*, 101 Mo. App. 420 (74 S. W. 505). What actions of the shipper will constitute delivery to a carrier are necessarily governed by the surrounding circumstances of each case. Such conventional arrangements may be varied by usage or by a particular course of dealing between the parties. They may make such stipulations upon the matter of delivery as they see fit, and when made they are to govern: 4 R. C. L., p. 690, § 168.

3. The station agent and conductor of defendant were informed on the day before the intended shipment that the plaintiff's cattle were to be put into the pens for shipment, and no further formal notice was necessary: 1 Hutchinson, Carriers (3 ed.), § 115; *Mason v. Missouri Pac. Ry. Co.*, 25 Mo. App. 473; *Nelson v. Chicago, B. & Q. R. Co.*, 78 Neb. 57 (110 N. W. 741).

4. A delivery of cattle to a carrier may be either actual or constructive, and when made in accordance with the recognized custom and practice prevailing in the dealings between shippers of livestock and the railway company it will bind the carrier and constitute an acceptance, and when the facts are in dispute the question of delivery is for the jury: 4 R. C. L., p. 692, § 170; 4 Elliott, Railroads, § 1413; *Deming v. Merchants' Cotton-Press & S. Co.*, 90 Tenn. 306 (17 S. W.

89, 13 L. R. A. 518). But no formal acceptance is necessary where the agent has knowledge of the delivery of the goods with the intention that they be shipped and makes no objection thereto. It is not essential that there be any written receipt or bill of lading.

5. The liability of the carrier as common carrier begins with the actual delivery of the goods for transportation, and not merely with the formal execution of a receipt or bill of lading: 6 Cyc. 413. The trial court properly overruled defendant's motion for a non-suit and request for a directed verdict in its favor.

The court charged the jury practically in conformity with the law as above stated. Instruction No. 9, excepted to by defendant, is as follows:

"If you find that plaintiff brought his cattle to the stockyards of the defendant railroad company for transportation on the train from Juntura to Hope in accordance with the directions of its agent, or in accordance with its recognized custom of receiving cattle for transportation, then this would constitute a sufficient delivery to compel the defendant to transport them within a reasonable time."

6. It is contended on the part of the defendant that the court erred in receiving evidence concerning the market value of the cattle at Hope, Oregon, on September 17, 1915, in the condition in which they were delivered and of the shrinkage per head between the time they were delivered to the railroad company at Juntura and when they reached Hope on the following day. The measure of damages was based upon the loss in the weight and value of the cattle caused by the delay in the shipment from Juntura and delivery at Hope. Both places are in the same county about 40 miles apart, which is a stock-raising district, a place of purchasing and not a selling market for beef cattle, as the

term is usually understood. It appears that upon the trial of the cause the value, whether at Juntura or at Hope, was assumed by the attorneys and witnesses to be the same, except for the shrinkage caused by the unnecessary delay in shipping and delivery. The question as to the usual and ordinary loss of weight in the shipment for such a distance was all detailed and explained to the jury. It could not be ascertained exactly. The jury was in a position to and undoubtedly did determine the amount of deterioration in the value of the cattle which was the usual and natural consequence of a failure to carry and deliver them within a reasonable time, and which would be regarded as reasonably within the contemplation of the parties to the contract when the same was made: *Levy v. Nevada-California-Oregon Ry. Co.*, 81 Or. 673 (160 Pac. 808); *Howell v. St. Louis & Hannibal Ry. Co.*, 171 Mo. App. 92 (153 S. W. 578).

7. The court charged the jury to the effect that if they found for plaintiff, the measure of damages would be the depreciation in the value of the animals caused by the negligent delay in the shipment: 4 R. C. L., p. 998, § 466. We find no variance from the rule as to damages, either in the admission of evidence or instructions to the jury, which would change the result or constitute reversible error.

8. The agent, Delsole, was named as defendant in the action. No cause of action against him was stated in the complaint, and no attention seems to have been given him upon the trial. The lower court instructed the jury as though the railway company was the only defendant. Delsole's name should be stricken from the judgment.

Finding no prejudicial error in the record, the judgment against the defendant Oregon Short Line Railway Company is affirmed.

AFFIRMED.

Argued November 1, affirmed December 19, 1916.

COLVIN v. GOFF.*

(161 Pac. 568.)

Evidence—Parol Evidence—Failure of Consideration—Conditional Delivery.

1. The rule that parol evidence cannot be introduced to contradict or vary the terms of a written instrument excludes all evidence between the maker and payee of the note that the liability of the former should be conditional, unless the condition affects the consideration, so that as a result of its failure there is a total or partial failure of consideration.

Evidence—Parol Evidence—Failure of Consideration—Advances of Money.

2. Where one of several defendants jointly indicted for a crime, who had been acquitted, advanced to another, who had been convicted, money to enable the latter to prosecute his appeal, taking a note therefor, parol evidence is not admissible to show an agreement that the makers should be liable on the note only in case the conviction was reversed, since that condition did not affect the consideration for the note, and, if considered as a collateral contract, was void for want of consideration.

[As to parol evidence of conditions in notes and bills, see note in 128 Am. St. Rep. 609.]

From Grant: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE McBRIDE.

This is an action by Ben Colvin against Lester Goff and Jim Clark to recover the amount due upon a promissory note. The note is in the usual form, payable upon demand, with the ordinary provision for interest and for attorney's fees in case of suit.

The answer, which is too lengthy to be inserted, admits the execution of the note, and sets up the following affirmative defense: That in May, 1913, plaintiff, defendants and J. B. Gingles and Monard Fix were jointly indicted by the grand jury of Grant

*On the general rule that parol evidence is not admissible to vary, add to, or alter a written contract, see note in 17 L. R. A. 270.

County for cattle stealing; that plaintiff and defendants were arrested upon said charge on May 24, 1913; that on November 22d the defendant Goff was duly convicted, and that on the 23d of November the indictment was dismissed as to the defendant Clark; that thereafter, in December, 1913, the defendant Goff being desirous of appealing to the Supreme Court from the judgment of conviction against him, the plaintiff agreed to advance to the defendants, Goff and Clark, the sum of \$600, to be applied by the defendant Goff to the payment of the expenses of said appeal, and to further advance to defendants the sum of \$400, making \$1,000 in all which the defendants were to repay, share and share alike, and it was further mutually agreed in the event that the judgment of the Circuit Court should be affirmed that the said sum of \$600 was not to be repaid to plaintiff; that in August, 1912, plaintiff delivered to defendant Jim Clark \$100, with instructions to deliver said sum to J. B. Gingles and Monard Fix, the codefendants with plaintiff and defendants in the criminal action, and that defendant delivered the \$100 as directed; that on May 16, 1914, the defendants and plaintiff entered into a final contract whereby it was agreed that these defendants would make, execute and deliver to plaintiff the promissory note sued upon, conditioned by said contract that said promissory note would become a binding contract on the part of defendants only in the event that the Supreme Court would reverse the judgment of the Circuit Court against defendant Goff, and it was then mutually agreed that, if said judgment should be affirmed, the said note should become void and of no effect, and that defendants, in pursuance of said agreement, executed the note in suit, and that the \$700 mentioned therein is the same \$600 advanced

to defendants by plaintiff, together with the \$100 delivered by plaintiff to Clark; that on June 9, 1914, the Supreme Court affirmed the judgment against defendant Goff; that in accordance with the agreement between plaintiff and defendants the note became null and void and of no effect, and the consideration thereof failed; and that at no time since its execution has the same been a binding contract upon the part of defendants to pay plaintiff the sum of \$700 or any sum.

The new matter being denied by a reply, the case came on for trial. The plaintiff introduced the promissory note and rested. The defendants offered evidence tending to prove the new matter alleged in the answer, but upon objection the testimony was excluded by the court upon the ground that such matter did not constitute a defense. There was a verdict for plaintiff, and defendants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. A. D. Leedy*.

For respondent there was a brief over the names of *Mr. J. Roy Raley*, *Mr. Errett Hicks* and *Mr. Otis Patterson*, with an oral argument by *Mr. Raley*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. While the amount involved here is comparatively small, the question presented is interesting by reason of apparent variance in the decisions of many of the courts, although these seeming contradictions disappear upon a close analysis of the decided cases. It is an elementary general rule that parol evidence cannot be introduced to contradict or vary the terms

of a written instrument, and this rule applies as well to promissory notes as to other written contracts: *Burnes v. Scott*, 117 U. S. 582 (29 L. Ed. 991, 6 Sup. Ct. Rep. 865); *Kelsey v. Chamberlain*, 47 Mich. 241 (10 N. W. 355); *Whitwell v. Winslow*, 134 Mass. 343; *Cooper v. German Nat. Bank of Denver*, 9 Colo. App. 169 (47 Pac. 1041); *Davis v. Stout*, 126 Ind. 12 (25 N. E. 862, 22 Am. St. Rep. 565); *Prescott v. Hixon*, 22 Ind. App. 139 (53 N. E. 391, 72 Am. St. Rep. 291); *Graves v. Clark*, 6 Blackf. (Ind.) 183; *Getto v. Binkert*, 55 Kan. 617 (40 Pac. 925); *San Jose Savings Bank v. Stone*, 59 Cal. 183. See note to Section 81a, Daniel, Neg. Instruments. This rule has been applied in cases very similar to the one at bar. Thus in *Foster v. Jolly*, 1 Crompt. M. & R. 703, which was a suit to recover against the maker of a promissory note payable 14 days after date, the defense was that the defendant's brother-in-law contracted the debt for which the note was given as agent for a certain co-operative society, and was sued for the amount. The brother-in-law gave the names of certain members of the society who were sued for the debt and a judgment obtained. The brother-in-law also confessed judgment, and was put in jail upon a *ca. sa.*, and gave the note in question upon an alleged promise that its payment should not be enforced in case the plaintiff should recover a verdict against the other members of the society. This was held not a good defense; Lord Abinger, C. B., saying:

"I am of opinion that the evidence tendered by the defendant went to vary the contract appearing on the face of the note. It is not a question of consideration or collateral security. The consideration of the instrument was not impeached, nor was it given as a collateral security, but the defense attempted to be established was in direct contradiction of the terms of the

note. The maker of a note payable on a day certain cannot be allowed to say, 'I only meant to pay you upon a contingency'; that is at variance with his own written contract. The case must be governed by that of *Rawson v. Walker*."

In *Central Savings Bank v. O'Connor*, 132 Mich. 578 (94 N. W. 11, 102 Am. St. Rep. 433), which was an action upon promissory notes, the defendant pleaded a collateral agreement very similar to the defense here:

"That the notes were given for the amount of a chattel mortgage which plaintiff held upon the property of the J. R. Pearson Company, which property defendant O'Connor had purchased; that the title to said notes never passed to said plaintiff; that the notes were delivered to plaintiff upon the clear and distinct understanding and condition agreed to by plaintiff that in case the said J. R. Pearson Company should thereafter be forced into bankruptcy by any of its creditors, upon proceedings instituted by them for that purpose, and adjudicated a bankrupt, said notes would thereupon, in the event of the happening of such contingency, become and be null and of no effect, and were not to be paid, and that it was upon said condition said notes were delivered to said plaintiff."

The court said:

"The meritorious question is whether the defense set out in this notice is one which can be established by parol testimony. It is doubtless true, as contended by the appellants' counsel, that it may be shown that a promissory note, unconditional in terms, was conditionally delivered; that is to say, that it was placed in the hands of the payee, but with the distinct understanding that it was not to be operative or to become a binding obligation until the happening of some event: *Brown v. St. Charles*, 66 Mich. 71 (32 N. W. 926); *Burke v. Dulaney*, 153 U. S. 228 (38 L. Ed. 698, 14 Sup. Ct. Rep. 816). On the other hand, the rule is

firmly established that, where a promissory note for a certain amount, payable at a certain time, is delivered into the hands of the payee, to take effect presently as the obligation of the defendant, parol evidence to introduce conditions or modifications of the terms is not admissible. The case of *Hyde v. Tenwinkel*, 26 Mich. 93, illustrates this rule. It was there held that an attempt to show a verbal contemporaneous agreement to reduce a note from an absolute and specific promise to a defeasible engagement was inadmissible. The same rule has been followed: one of the recent cases being *Phelps v. Abbott*, 114 Mich. 88 (72 N. W. 3); *Burns & Smith Lumber Co. v. Doyle*, 71 Conn. 742 (43 Atl. 483, 71 Am. St. Rep. 235). We think it clear that the present case falls within that line of cases which precludes parol evidence offered to vary the terms of a written instrument. If we adopt the testimony of the defendant as correctly stating the transaction, and more certainly if we adopt the terms of the notice of defense by which the defendant was bound, these notes were delivered to take effect presently, but upon the alleged parol agreement that they were to become void in the event that a certain contingency should happen. This is no more than averring that plaintiff entered into a contemporaneous parol agreement that, while the defendant's obligation bound him to pay absolutely the sums of money at specified times, yet in a certain contingency this sum should not be payable at all, and the notes be redelivered. It is suggested also that there was a total failure of consideration. This cannot be held, for the reason that there was transferred to the defendant, in consideration for the notes, the chattel mortgage and promissory note of the J. R. Pearson Company, which note had indorsers against whom it would be enforceable. There was no absolute and total failure of consideration, and no defense of partial consideration was noticed under the general issue."

Other cases tending more or less to support the doctrine announced in the case last cited are *Stoddard v.*

Nelson, 17 Or. 417 (21 Pac. 456); *Wilson v. Wilson*, 26 Or. 251 (38 Pac. 185); *Murray v. Kimball Co.*, 10 Ind. App. 184 (37 N. E. 734); *Garner v. Fite*, 93 Ala. 405 (9 South. 367); *Hubble v. Murphy*, 1 Duv. (Ky.) 278; *Clanin v. Esterly Harvesting Machine Co.*, 118 Ind. 372 (21 N. E. 35, 3 L. R. A. 863). The case of *Wilson v. Wilson*, 26 Or. 251 (38 Pac. 185), has some features in common with the case at bar. The defense was that the promissory note in question was, in fact, intended as a mere memorandum, and was not to be paid until the amount thereof was realized from the proceeds of a mine which had been transferred to the defendant. This court held adversely to defendant's contention. Cases which, when casually examined, seem to hold an opposite view, are numerous, but, as we have before observed and shall presently show, the contradiction is more apparent than real, and most of the cases can be harmonized and shown to be subject to a general rule consistent with the safety of commercial paper and with the general rules of law respecting the admission of parol evidence to contradict or vary the contents of written instruments. The case of *Ware v. Allen*, 128 U. S. 590 (32 L. Ed. 563, 9 Sup. Ct. Rep. 174), may justly be termed a leading case on this subject. In that case, which was a suit in equity to enforce the payment of two promissory notes for \$5,000 each, made in favor of plaintiff by the firm of Allen, West & Bush, the facts were that one T. P. Ware, a brother of plaintiff, was indebted to the defendants for merchandise in the sum of \$18,000. His business was conducted by the plaintiff, and was so embarrassed that the debts could not be paid. Plaintiff a year or two before had conducted a business in his own name at the same place, and, being likely to fail, had sold out his business to his brother, but, os-

tensibly as the agent of the latter, continued to manage and control it. In this condition of affairs plaintiff visited Allen, West & Bush and represented that his brother was unable to pay his debts; that his creditors were becoming impatient; that he himself held two notes for \$5,000 each against his brother; that he desired the defendants to institute proceedings by attachment to collect their claim and his own, and for that purpose proposed that he should transfer his notes against his brother to them, taking their note for \$10,000, and that, if they would consent to this arrangement, he would show them sufficient reason for seizing the property by attachment. The defendants expressed their doubt as to the legality of such a course, and said that they would like to consult their counsel before making the arrangement, but plaintiff seemed impatient of this delay, and insisted that in the meantime somebody else might attach the property and defeat both their claims; and finally, reluctantly yielding to his importunities, the defendants took his notes and gave their own as requested. Before the note was signed it was distinctly agreed that it was to be of no effect until defendants should have had an opportunity to consult their counsel, and he should assure them that the proceeding was lawful, and the attachment for the full amount of both claims could be enforced. The defendants' counsel, upon being consulted, emphatically disapproved of it, and advised the defendants to have nothing to do with it or with the notes of W. P. Ware against his brother. The defendants then sued and attached for their own debt and collected it. Subsequently W. P. Ware brought a suit in equity, as required by the law of Mississippi where an attachment is sought, and the defense above stated was upheld. Mr. Justice MILLER, after reflecting severely upon the

conduct and motives of plaintiff in procuring the agreement and intimating that the whole proceeding was probably a fraud, said:

“We did not think it necessary to inquire further into the evidence brought to sustain this defense; for we are quite clear that the testimony does establish the agreement alleged by the defendants to have been made at the various interviews between the persons composing the firm of Allen, West & Bush, or some of them, and the plaintiff, at and before the time when they delivered to him the instrument sued on and received from him the two notes made by his brother, T. P. Ware; that the firm were to have an opportunity to consult counsel, upon whom they relied, as to the validity of the transaction; and that, if such advice was adverse, then the instrument given by them was to be of no effect. It also sufficiently appears that they were advised, without hesitation, by the counsel to whom they had reference in those conversations about the agreement, that the transaction was not one that would stand the test of a legal investigation. This is to be considered in connection with the fact that the firm only brought suit for their own claim, and have since returned, or offered to return, the notes of W. P. Ware, which were given him by his brother and delivered to them when the paper was executed. We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter.”

In the case of *Pym v. Campbell*, 6 El. & Bl. 370, cited by Mr. Justice MILLER, it appeared that the defendants agreed in writing to purchase an interest in

an invention; the agreement being absolute on its face. In an action for breach the defendants showed that, when the negotiations had progressed so far that the price had been agreed upon in case defendants concluded to buy, a meeting was arranged at which the plaintiff was to explain his invention to two engineers appointed by defendants, when, if they approved, the machine should be bought. At the time appointed the defendant and the engineers attended, but the plaintiff did not appear. The plaintiff finally arrived after one of the engineers had gone. The engineer present approved, and it was proposed that, as the parties were all present, and it might be troublesome to meet again, a paper should then be drawn up and signed which, if the absent engineer approved, should be the agreement, but that, if he disapproved, the paper should not be an agreement. This was done, and the absent engineer upon subsequent inspection disapproved of the machine. The court held the defense good, Mr. Justice EARLE saying:

“I think that this rule ought to be discharged. The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional; and if that had been so it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive, and cannot be varied by parol evidence; but in the present case the defense begins one step earlier; the parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defense may be

set up without ground, and I agree that a jury should therefore always look on such a defense with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

In *La Grande National Bank v. Blum*, 26 Or. 49 (37 Pac. 48), the defense pleaded was that at the time of the execution of the note in suit the plaintiff entered into an agreement with defendants whereby defendants were to collect for plaintiff two promissory notes held by plaintiff against one O. N. Ramsay, which it delivered to defendant under an agreement that he would pay over the proceeds if collected, or, if unable to do so, would return the notes, and that the note in suit was given to secure the compliance with said contract, and that defendant had performed his part of the agreement. This was held a good defense, Mr. Justice BEAN saying:

"If the note was given to secure the performance of Blum's contract to collect and pay over to plaintiff the proceeds of the Ramsay notes, or to return them if not collected, and Blum has performed his agreement, such performance would manifestly operate as a failure of consideration."

Another case cited by counsel for defendant is *McKnight v. Parsons*, 136 Iowa, 390 (113 N. W. 858, 125 Am. St. Rep. 265, 15 Ann. Cas. 665, 22 L. R. A. (N. S.) 718). In this case the note was given as the purchase price of a cow which was warranted to be a good breeder, and there was an agreement that the note should not be negotiable until the cow should have been bred and have a calf. The payee negotiated the

note before due, and it subsequently turned out that the cow was barren. As between the payee and the purchaser there was an evident failure of consideration, and the dispute arose collaterally as to whether the assignee of the note was an innocent purchaser. It was contended that the agreement of the payee of the note not to negotiate it until the time agreed upon and the failure of the payee to deliver the cow with calf according to the contract constituted such a fraud upon the purchaser as placed upon the assignee of the note the burden of pleading and proving that he purchased the note in good faith and without notice, and this contention was held good; the court saying incidentally that it was competent to show that the delivery of the note was conditioned and that the condition had not been complied with. Many other cases along the same line might be cited, notably *Beach v. Nevins*, 162 Fed. 129 (89 C. C. A. 129), re-reported in 18 L. R. A. (N. S.) 288, which contains copious notes citing many decisions sustaining the principal case. See, also, *Excelsior Sav. Fund & Loan Assn. v. Fox*, 253 Pa. 257 (98 Atl. 593), reported and annotated in Cent. Law Journal, Vol. 83, No. 16, the notes to which cite many decisions sustaining the main case as well as those opposed or apparently in conflict. From all these decisions we are of the opinion that this general rule may be deduced. It may be shown as between the maker and the payee that prior to the delivery of the note its payment was made conditional whenever the condition or contingency affects the consideration; that is to say, if the maker of the note stipulates that it shall take effect only upon the happening of an event, and the failure of such contingency affects the consideration to the extent that he does not get the value or thing that he has bargained for, it is a good

defense, because there is a failure of consideration, or, if the note is given upon a stipulation that it shall not be effective unless a particular event shall happen, and by reason of a failure of the event to happen the maker does not reap the benefit contemplated by reason of its occurrence, there is a failure of consideration and the stipulation is good. Take the case of *Ware v. Allen*, 128 U. S. 590 (32 L. Ed. 563, 9 Sup. Ct. Rep. 174), one of the inducements to sign the note was to facilitate the collection of a debt. The note would not have been signed unless the proposed contract would effectuate that purpose. It was agreed that the contract would not be complete until the makers of the note ascertained from counsel whether the proposed arrangement would effectuate that purpose. The note was not the complete contract, but only one part of the contract. The contract was not to be complete until counsel approved it. He did not approve it, and therefore it was incomplete, and the makers of the note had nothing of value for the note which they had given. In its final analysis, leaving out of consideration the fraudulent practices of Ware and the evident fact that the notes of his brother which he left in the possession of the defendants were collusive and worthless to them, there was a failure of consideration. In the case of *La Grande Nat. Bank v. Blum*, 26 Or. 49 (37 Pac. 48), the consideration of the note was a contract to collect and pay over certain moneys to the plaintiff. If the moneys were collected and paid over, there was nothing due the plaintiff and the consideration failed; and it was so held. So also in the case of *Pym v. Campbell*, 6 El. & Bl. 370, the contract was incomplete. A part of the contract was that before it became a complete contract, the makers of the note should have the benefit of certain expert advice

which was in itself a thing of value, and that the contract should not be complete until he should obtain such favorable advice. The favorable advice was not given, the contract was not completed, the defendants purchased no machine, and the plaintiff held a note utterly without consideration. If the defendants had advanced money under such circumstances, they could have recovered it back, and by the same token they would not be required to pay a note which was given in lieu of an advancement of money. It seems plain to us that, unless the happening of the alleged contingency or its failure to happen is so intimately related to the transaction as to amount to a failure of consideration, it cannot be pleaded as a defense. Such is the opinion of Mr. Daniel. He says:

“It has been held in a number of cases that a note may be delivered to the payee to take effect only upon a condition precedent, and that default in the fulfillment of such conditions may be shown by parol evidence, and will defeat recovery as between immediate parties. But unless the nonfulfillment of the condition goes to the failure of consideration, this would seem to trench upon fixed principles of law. Evidence of want of consideration is admissible between original parties. ‘Every bill or note imports two things: Value received, and an agreement to pay the amount on certain specified terms. Evidence is admissible to deny the receipt of value, but not to vary the engagement.’ The cases amply sustain the foregoing views, which seem to us altogether correct. It has been held that it is competent to show by parol that at the time a note was made it was agreed that it should be held for nothing on the happening of a certain event. But unless such event operated a failure of consideration, we cannot perceive upon what principle such a view could be taken. The consideration of contracts in writing is in general open to inquiry, and it is not an infringement of the rule excluding parol evidence to add to, vary or contradict writings, to receive parol

evidence of the actual consideration for the purpose of determining its validity, or its failure, or that from any cause it is sufficient or insufficient to support the contract": Daniel, Neg. Instruments, § 81a.

In this view of the law let us consider the defense pleaded in the answer here.

2. It is admitted that the defendants received from plaintiff \$700 in cash. It is true that it is alleged on behalf of Clark that the plaintiff "delivered" to him \$100 of the money, and that he "delivered" it to Monard Fix, but the pleading artfully evades any allegation that he was acting as the agent or bailee of plaintiff, and is entirely consistent with the fact that he borrowed it on his own account for the purpose of paying or "delivering" it to Monard Fix. If such should be the case, perjury could never be predicated upon the falsity of this allegation in the answer. The fact remains that these defendants between them received \$700 of plaintiff's money and gave their note for it; that \$700 was the consideration for the note. They substantially admit that it was given for a full consideration, but say it was to become void upon a contingency. What is the contingency? "If the Supreme Court of Oregon affirms the judgment against Goff, the note shall become void." This is the allegation in a nutshell. How does this affect the consideration? Not at all. It is not alleged that plaintiff was in any way personally or financially interested in the result of Goff's appeal. His acquittal could cancel no debt or lessen by a single dollar his obligation to plaintiff. It is not alleged that plaintiff wished or urged or procured him to appeal. On the contrary, it is alleged that "Lester Goff was desirous of appealing from his conviction," and that the plaintiff agreed to advance him the necessary money for that purpose. So far as the record

shows, the plaintiff had no more interest in the result of the appeal than any bank would have. It was not a part of the consideration of the note which by its terms went into effect at once and could have been negotiated the next day. There was nothing to be done to make it a complete contract. For the reasons given above the alleged agreement is not even a good collateral contract, as it was entirely without consideration, so that, whether we view it as an attempt to plead a contract not completed or a collateral contract rendering the note void by reason of a condition subsequent, the defense must fail.

The judgment is affirmed.

AFFIRMED.

Argued October 31, reversed November 28, affirmed on rehearing
December 12, 1916.

STATE v. GOODALL.*

(160 Pac. 595.)

Criminal Law—Justices of the Peace—Jurisdiction of Subject Matter cannot be Waived.

1. On appeal from a conviction in a Justice's Court, the only jurisdiction acquired by the Circuit Court is simply that of an appellate tribunal, and once a question of jurisdiction presents itself in any stage of a proceeding, and it is discovered that the court has no jurisdiction of the subject matter, it is the duty of the court to refuse to proceed further, for jurisdiction over the subject matter cannot be waived.

[As to power of Superior Court with respect to justice's judgment where transcript has been filed in that court, see note in Ann. Cas. 1914A, 415.]

Criminal Law—Indictment and Information—Sufficiency of Statement—Statutes.

2. Where the facts stated in the complaint show that the defendant has done something that the law prohibits, such pleading is sufficient

*An indictment not charging the means of "torture," when directly raised, has been held insufficient in *State v. Watkins*, 101 N. C. 702 (8 S. E. 346), and sufficient in *State v. Falkenham*, 73 Md. 463 (21 Atl. 370).

under the statute, and any objection to the information is waived by failure to specifically demur, on the ground that it does not set out the offense with the particularity required by Title XVIII, Chapter 7, of Civ. Code, except as to the jurisdiction of the court or that the complaint does not state facts sufficient to constitute a crime.

Pleading—Special Demurrer—Statutes.

3. Special demurrers are now abolished; therefore the statute contemplates but one demurrer to a pleading, and any objections not set forth therein are waived, unless they go to the jurisdiction of the court or to the point that the facts stated do not constitute a crime: Sections 1491, 1499, L. O. L.

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

Upon a trial before a justice of the peace, the defendant, Scott Goodall, was convicted of the crime defined by Section 2103, L. O. L., from which judgment he took an appeal to the Circuit Court, where, upon a trial being had, he was again convicted and sentenced, and now prosecutes his appeal to this court.

REVERSED. AFFIRMED ON REHEARING.

For appellant there was a brief over the names of *Mr. Turner Oliver* and *Mr. Joel H. Richardson*, with an oral argument by *Mr. Oliver*.

For the State there was a brief with oral arguments by *Mr. Colon R. Eberhard*, District Attorney, and *Mr. Geo. M. Brown*, Attorney General.

MR. JUSTICE BENSON delivered the opinion of the court.

1. The jurisdiction of a justice of the peace to try criminal cases is limited by Sections 2411 and 2412, L. O. L., to the crimes enumerated in the former and the maximum penalties named in the latter. Cruelty to animals is not included in the sections mentioned in

Section 2411, and the maximum penalties named in Section 2103 exceed the limit prescribed in Section 2412. The power of the justice in this case was confined to conducting a preliminary examination with a view to a subsequent investigation of the charge by a grand jury. The only jurisdiction acquired by the Circuit Court was simply that of an appellate tribunal. In *Evans v. Christian*, 4 Or. 375, this court says:

"If the court below had no jurisdiction to proceed, this court, which possesses only appellate jurisdiction, could acquire none by the appeal. And when a question of jurisdiction presents itself in any stage of a proceeding, and it is discovered that the court has no jurisdiction, either over the parties or the subject matter of the cause, it is the duty of the court on its own motion to refuse to proceed further. Any attempt to exercise judicial functions otherwise than as authorized by law would be a nullity and an idle waste of time."

Nor can the lack of jurisdiction of the subject matter be waived: 12 Cyc. 228. It follows that the judgment of the lower court must be reversed and the cause dismissed, and it is so ordered.

REVERSED. AFFIRMED ON REHEARING.

Affirmed on rehearing December 12, 1916.

ON PETITION FOR REHEARING.

(160 Pac. 595.)

Mr. Colon R. Eberhard, District Attorney, and *Mr. George M. Brown*, Attorney General, for the petition.

Mr. Turner Oliver and *Mr. Joel H. Richardson*,
contra.

In Banc. MR. JUSTICE BENSON delivered the opinion of the court.

2. In the former opinion herein we dismissed the action upon the theory that the justice of the peace, before whom the trial was originally had, was without other jurisdiction in the premises than that of a committing magistrate, and we did not then consider any other of the questions raised upon the appeal. Since then our attention has been called to the fact that Section 2103, L. O. L., upon which the complaint is based, is composed of Sections 1 and 2 of an act passed by the legislature in 1885, and that Section 8 of that act survives as Section 5642, L. O. L., and reads thus:

“Justices of the peace and police judges shall have concurrent jurisdiction over all offenses committed under this act.”

Our former opinion, therefore, was clearly erroneous, and we shall now consider the assignments of error upon which the appeal is based. The charging part of the complaint under which the defendant was tried and convicted reads as follows:

“The said Scott Goodall, on the twenty-first day of September, 1915, in Union County, State of Oregon, did then and there cruelly torment and torture a cow then and there being in said county and state contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Oregon.”

To this complaint the defendant interposed a demurrer in the following language:

“Comes now the defendant in the above-entitled case and demurs to the information filed herein for the reason that the same does not state facts sufficient to constitute a crime.”

The demurrer was overruled and a trial was had resulting in the conviction of the defendant. He then appealed to the Circuit Court, where the same was again argued, submitted and overruled, whereupon the defendant without leave of court filed another demurrer based upon the ground that the complaint does not substantially conform to the requirements of Chapter VII of Title XVIII of the Code of Procedure in criminal actions, which, upon motion of the district attorney, was stricken from the files.

Defendant first insists that it was error to overrule the demurrer filed in the Justice's Court, but this contention is not tenable. The complaint is in the language of the statute, and, as has been well said by the learned circuit judge:

"The facts stated in the complaint show that the defendant has done something that the law prohibited."

His criticism of the pleading appears to be that the acts constituting the alleged cruelty are not set out with such particularity as is required by Chapter VII of Title XVIII of the Code, an objection which is waived by a failure to demur specifically upon that ground. As is said in *State v. Bruce*, 5 Or. 68:

"But having slept upon his rights by failing to demand, by demurrer, a fuller specification of the facts and circumstances necessary to the complete identification of the transaction charged against him as a crime, he cannot be heard to object to the indictment after a trial upon the merits, when it substantially charges a crime in the language of the statute."

3. It is next urged that the court erred in striking from the files the "special demurrer." It may be remarked in passing that special demurrers, as known to the common law, are now abolished, but the prin-

ciple survives that "the demurrer shall distinctly specify the grounds of objection to the complaint," and the statute contemplates but one demurrer to a pleading, and objections not specified therein are waived unless they go to the jurisdiction of the court or to the point that the facts stated do not constitute a crime: Section 1499, L. O. L. It follows that the filing of the demurrer in the Justice's Court waived the objections sought to be raised by the second demurrer, and it was then too late to bring them into the record, for which reason the Circuit Court did not err in striking it from the files: *State v. Mack*, 20 Or. 234 (25 Pac. 639); *Byers v. Ferguson*, 41 Or. 77 (65 Pac. 1067, 68 Pac. 5).

It is also contended that the court erred in overruling defendant's objection to the admission of evidence, for the reason that the complaint is insufficient. There is no bill of exceptions in the record, and so this question is not properly before us, but if it were, what has been said as to the other assignments would dispose of it also. The judgment should be affirmed, and it is so ordered. **AFFIRMED ON REHEARING.**

Argued October 31, affirmed December 19, 1916.

PARKER v. KELSEY.*

(161 Pac. 694.)

Gifts—Evidence—Parol Gift of Land.

1. Evidence in a suit to quiet title held sufficient to support a finding that plaintiff's father made a parol gift of the land in question to his daughter during his lifetime.

[As to conveyances which must be regarded as gifts, see note in 65 Am. St. Rep. 798.]

*The question as to whether a parol gift is a conveyance is discussed in a note in 67 L. R. A. 461.

On adverse possession by donee under parol gift, see note in 35 L. R. A. 835. **REPORTER.**

Gifts—Parol Gift of Land—Statutes.

2. Under Section 804, L. O. L., providing that interests in land cannot be created or transferred except by operation of law, or by an instrument in writing, a mere parol gift of realty will not of itself pass title.

Adverse Possession—Requisites—Effect.

3. Continuous adverse possession of land for ten years under a claim of title is sufficient to pass to the possessor the fee-simple estate.

Adverse Possession—Requisites—Parol Gift.

4. A parol gift of land is sufficient to inaugurate adverse possession.

Adverse Possession—Effect—Extent.

5. Where plaintiffs claim by adverse possession inaugurated by a parol gift of land, they may obtain title to the portion actually inclosed only.

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is a suit by Violet Parker and Thomas H. Parker, her husband, against Grace Kelsey, widow and executrix of the estate of L. S. Kelsey, deceased, and others, to quiet title to a certain quarter-section of realty in Union County. The complaint alleges that she is the owner in fee simple of the land, and that since the year 1900 she and her husband have been in the continuous, exclusive, visible, open and notorious adverse possession of the tract under assertion of right claiming at all times to own the same as against the whole world.

A demurrer to the complaint was overruled, and the defendants who appeared filed an answer denying all the allegations of ownership in the plaintiffs. That pleading also recites, in substance, that Grace Kelsey is the surviving widow, and that Violet Parker together with certain defendants are daughters of L. S. Kelsey, deceased; that he made a will devising all his real property to his own children and those of a deceased daughter subject to a life annuity of \$1,500 per annum to his widow; that at the time of his death the

decendent was the owner in fee of the land in question; and that they deraign title thereto by virtue of his will.

The reply traverses all the new matter of the answer. After hearing the testimony and argument of counsel, the Circuit Court entered a decree quieting the title of the plaintiff Violet Parker to all the land inclosed by her, being the entire quarter, except perhaps five or six acres lying outside her fences. The defendants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Charles H. Finn*.

For respondents there was a brief over the name of *Messrs. Crawford & Eakin*, with an oral argument by *Mr. Thomas H. Crawford*.

MR. JUSTICE BURNETT delivered the opinion of the court.

There is no contention in the testimony but that the plaintiffs, Violet Parker and her husband, have been in continuous possession of the premises since about February or March, 1899; that they have inclosed the same, farmed them either by themselves or by tenants every year, and, finally, that in 1913, shortly before the accidental death of her father, they built a small house and shed thereon. It is agreed, also that the plaintiffs have paid the taxes on the property every year since 1899. They base the title of Violet Parker on a parol gift of the land made to her by her father in the early spring of 1899, coupled with her entry thereupon in pursuance of the gift, and continuous adverse holding of the same until the present time. The only writing involved is a letter written by L. S. Kelsey to the plaintiff Violet some time in February

or March, 1899, and delivered to her by her sister at the direction of the writer. It is here set out:

"Violet—Dear Daughter:

"If Harry [husband] wants to go farming, I will make you a present of the forty acres of land that I bought of Will Tanner, and if that is not enough, I will rent him some more land, but I think he had better run the post office this summer—as you would have to build a house on the land and fix it up.

"Your Loving F. [Father],
"L. S. KELSEY."

The plaintiff Violet testified:

"Well, I accepted the land in 1899 when my father gave it to me, and in 1900 I fenced—put a partition fence between his place and mine, his 40 acres joining and mine."

She stated that she and her husband farmed the land, kept up the ditches and fences, and in the spring of 1913 built a house and shed upon it; that she never paid any rent for it, but leased it to others part of the time, and otherwise she and her husband cultivated it themselves, using the crops and the rents for their own purposes; and that her father never claimed the land from her.

Laura Goff, her full sister, testified:

"Why my father always said that it was my sister's land; that he gave it to her, and he would be willing at any time to give a deed, if my stepmother would sign it, but he said she never would talk about signing it. He says, 'The land is hers, and it is hers while I live,' and he says, 'I will fix it when I die, that it will be hers afterward.' 'Why,' he says, 'she don't need to worry about a deed at all, because,' he said, 'the land will be always hers.' "

Lane Goff, the husband of Laura Goff, deposed that he contemplated buying the tract and inquiring of

Kelsey asked if it would be possible for him (Goff) to get the title to the land if he bought it, and he goes on to say (speaking of Kelsey):

“And he said that he could not give any better title than she had [referring to Violet]; that his wife refused to give a deed. And he says: ‘Well, it is her land and doesn’t belong to me.’ He says, ‘It is her land, and belongs to her while I live, and when I die I will fix it so it will be hers then [meaning Violet].’”

Goff also narrated as a witness that he contemplated running a ditch to his own land situated below the premises in question, and that Kelsey told him he could survey a ditch through on his land, but that when he made the survey he found that a ditch there would not accomplish his purpose. In another interview with Kelsey, as the witness states:

“He says, ‘You had better go and see Violet, and see if you can get a right of way through her, and that will put your ditch high enough, so you can get over the hill, or the place you want to get over’—a low place in the hill. And so I did. I went up and saw Mrs. Parker, and arranged with her for a right of way for the ditch, which she gave me, and I drew up a contract, and paid her for the right of way; gave her \$50 for the right of way for the ditch.”

Ed Carnes applied to Mr. Kelsey to lease the tract in question and another 40 immediately east of the same. Speaking of Kelsey, the witness says:

“And I went to him and I wanted to rent the land, and he says: ‘I’ll rent you my part of it, and you will have to see Mr. Parker. I give that to my daughter.’ He says, ‘You can rent it from him, I think.’ And I saw Mr. Parker and rented it, and also Mr. Kelsey’s.”

George Carnes went to Kelsey and tried to buy four acres in the southwest corner of the disputed tract. He imputes this language to Kelsey:

“ ‘Well, I don’t know, George.’ * * He studied a little while, and he says, ‘No, I can’t sell it because I deeded it to Violet Parker.’ And he says, ‘You go to her, and if she wants to sell four acres, it is all right with me.’ ”

Grant Dalton owned an irrigation ditch crossing the tract. He says that Mr. Kelsey told him that Mrs. Parker was going to shut the water off if he did not put in the boxes and fix the bridges up on the land. He said that Mrs. Parker owned it, and that she was going to shut the water off if he did not fix the hog gaps and the bridge. H. A. Monday says he sought to buy the land of Kelsey in March or April, 1913, and that the latter replied that he could not sell it to him; that he gave it to Violet when she was married. In 1907 or 1908 Sam Carnes applied to Mr. Kelsey to buy the land, but was informed by him that it belonged to the Parkers. C. Olsen testified that he was employed by the Parkers about 1899 or 1890 in putting in crops on the land; that during the time he was at work Kelsey came to him and told him that he had given that 40-acre tract to his daughter, Mrs. Parker. Chris Peterson applied to Kelsey for leave to conduct an irrigation ditch through the premises, but was referred by him to Mrs. Parker. The testimony for the defendants, who have appeared in the case, comes entirely from the widow and her children by Kelsey’s second marriage and the husband of one of her daughters. Charles Hutchinson, the son-in-law, testified, in substance, that some of the daughters by the second marriage reported to Kelsey that Violet had made a claim that she could hold the land by virtue of a tax title, and that after consulting an attorney her father made the statement that she could not hold the land by tax title or any other way; further,

that somewhere about 1910 Kelsey said that he himself would put in the claim for water on the land to be adjusted by the water board; and, lastly, that some time in 1912 Kelsey said to his wife: "Dearie, your head was level when you would not sign that deed." Mrs. Kelsey says that in 1899 she had a conversation with her husband about the land. She goes on to state:

"I asked Mr. Kelsey if he meant to deed the land, and he said, 'Yes.' I said, 'You can't do that, because I won't sign the deed.' He says: 'Oh, yes; we will give them the land.' And I said, 'In justice to them all, you have—'" (interruption by counsel). And she continued: "That he would have to give them all 40 acres of ground, and I said, 'If you do that, with the large family we have, you and I will be in the poor-house.' * * He said, 'Well, we will let them have the use of the land until they get started.' Presumably they never got started."

She reported that, when Mr. Kelsey came home from putting in the claim for the water right before the water board, he said:

" 'That shyster was there to put in a claim for that land.' I says, 'Did you allow him to do so?' He says: 'No, I didn't; I told him I would tend to my own water rights.' "

She also said that about the year 1910 her husband said that they (referring to the Parkers) did not own the land; that he would take care of the ditch rights, would enlarge the ditch if he wanted to; and that it would be a joke to pay damages through his own land. Again, she makes this statement in answer to a question about what Kelsey said concerning his intentions:

"Well, there was one day we were riding by the premises in question, and he called my attention to

the poor crop on the ground, and he said, 'I have a notion to sell the land,' as someone had wanted to buy it of him, and he said, 'It is practically cut off from what we already own, as we have sold Luther, and, for all Mr. Parker gets out of it, it doesn't make him much good.' I says, 'There would be a powwow in the Parker family if you speak about selling it,' and he says, 'I guess I will do as I choose. They don't own it yet.' He says, 'If we don't sell it, Violet can take it as her share when it comes to a settlement.'"

Maud Hutchinson, a married daughter, of the second group of children, testified about telling her father that Mrs. Parker had said:

"When Luther gets his breaking done, I'll swing my fence around it and take it in."

And that her father said:

"Violet had better be satisfied with what she is getting out of the land. If she gets too smart, she won't get that."

She says that Mr. Goff told Kelsey that Parker wanted some damages for enlarging the irrigation ditch across the premises, and that her father replied, "You don't have to pay any damages." And he said, "I own the land." Other members of the second set of children narrate their concurring versions of these different occurrences mentioned in the testimony for the defendants. Ethel Forsstrom speaks thus of what her father said:

"Well, when Mr. and Mrs. Parker were first married, his intention was to give them the land, and mother would never sign the deed, and later years I have heard him say he was thankful that she never signed the deed to the land; that, if she had of, he would have trouble getting his ditches through; otherwise the land belonged to him and he could do as he liked."

The fact that Kelsey had two sets of children and a second wife gives a pronounced coloring to the whole transaction and largely explains his statements to his wife and the younger members of the family. The testimony for the plaintiff comes mostly from disinterested witnesses. On the other hand, whatever effect may be given to it, the evidence for the defendants is from sources directly interested in the result. The fact stands undisputed that the plaintiffs have been in continuous possession of the property since 1899; that they have inclosed it, separating it from the lands of Kelsey; that they have paid the taxes on it continuously; that they have cropped it every year, either in person or by their tenants, and have never paid any rent.

1. The preponderance of the testimony is to the effect that Kelsey did everything he could to effect a gift of the property to his daughter by the first wife except to actually make a conveyance of the same, and this he would have done but for the fact that his wife refused to sign the deed. From her own lips come the expressions of his intention to give the land to the plaintiff Violet. This also is indicated by the statement of Mrs. Forsstrom. The very capable circuit judge who heard and saw the witnesses had far better opportunity to estimate the effect and value of the testimony or their statements than we who have only the paper recital before us. A careful reading of the entire record convinces us that his conclusion on the facts was right.

2. It is unquestioned that the mere parol gift of realty will not of itself pass title; for it is said in Section 804, L. O. L.:

“No estate or interest in real property, other than a lease for a term not exceeding one year, nor any

trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law."

3. On the other hand, it is a rule of property in this state that continuous adverse possession of land for ten years under a claim of title is sufficient to pass to the possessor the fee-simple estate. This effect is worked out by "operation of law" in harmony with the language of the statute just quoted: *Caufield v. Clark*, 17 Or. 473 (21 Pac. 443, 11 Am. St. Rep. 845); *Dunnigan v. Wood*, 58 Or. 119 (112 Pac. 531); *Stout v. Michelbook*, 58 Or. 372 (114 Pac. 929); *Parker v. Wolf*, 69 Or. 446 (138 Pac. 463).

4. The pivotal point in this case is whether a parol gift of the land is sufficient to inaugurate adverse possession. The rule is stated thus in 2 C. J., p. 150, § 267:

"Possession of land by a donee under a mere parol gift, accompanied with a claim of right, is adverse as against the donor, and if continued without interruption for the statutory period is protected by the statute of limitations and matures into a good title. The statute of frauds does not prevent one from entering and claiming under a parol gift and acquiring title by adverse possession. That such a parol gift conveys no title and operates only as a mere tenancy at will capable of revocation or disaffirmance by the donor at any time before the bar is complete is immaterial; it is evidence of the beginning of an adverse possession by the donee which can be repelled only by showing a subsequent recognition of the donor's superior title, or by the donor reclaiming or reasserting his title. • • •"

The following precedents teach the doctrine enunciated in the text quoted: *Lee v. Thompson*, 99 Ala. 95 (11 South. 672); *New Haven Trust Co. v. Camp*, 83 Conn. 360 (76 Atl. 1100); *Studstill v. Wilcox*, 94 Ga. 690 (20 S. E. 120); *Stewart v. Duffy*, 116 Ill. 47 (6 N. E. 424); *Wilson v. Campbell*, 119 Ind. 286 (21 N. E. 893); *Albright v. Albright*, 153 Iowa, 397 (133 N. W. 737); *Delano v. Air*, 157 Ky. 369 (163 S. W. 216); *Wheeler v. Laird*, 147 Mass. 421 (18 N. E. 212); *In re St. Louis Register Title*, 125 Minn. 484 (147 N. W. 655); *Davis v. Davis*, 68 Miss. 478 (10 South. 70); *Allen v. Mansfield*, 108 Mo. 343 (18 S. W. 901); *Tippenhauer v. Tippenhauer*, 158 Ky. 639 (166 S. W. 225).

Although he knew the plaintiffs were claiming title and were exercising notorious acts of ownership over the property, he took no steps whatever to rescind his gift. His statements to his wife and members of his younger family are not shown to have been brought to the attention of the plaintiffs, and would not constitute a rescission of the gift. They have a strong flavor of being made to placate the wife and her children and amounted to mere bluff. He never did nor said anything to the plaintiffs indicating any intention to carry into effect what he is reported by the defendants' witnesses to have said on the subject. It is not necessary to constitute adverse possession that it should have begun in an act of hostility against the former owner. By his own doing he may give impulse to that condition. Indeed, when a man of his own free will conveys land to another, he himself starts the condition of adverse claim in favor of the other party.

5. The decree quieted the title of the plaintiff Violet Parker only to what land was within her inclosure. This was correct, for, without any instrument contain-

ing words of present grant indicating the exact termini of the holding, the plaintiffs were without the conventional color of title to support their claim to anything more than that which they actually occupied. Besides this, they have not appealed from the decision of the Circuit Court. There is no error in the record either of fact or of law.

The decree is affirmed.

AFFIRMED.

Argued May 26, reargued September 15, reversed December 5, rehearing denied December 21, 1916.

SORSBY v. BENNINGHOVEN.*

(161 Pac. 251.)

Municipal Corporations—Streets—Injuries to Persons upon—Speed of Motor Vehicles.

1. Under Motor Vehicle Law (Laws 1911, pp. 266, 267), Section 2, subdivisions 11 and 17, declaring that in passing railroad or street-cars motor vehicles shall be operated upon that side of the street or railroad car with due care and caution for the safety of passengers alighting or descending, but should there be on the left side of the street or railroad car a clear space, motor vehicles shall be permitted to so increase their speed for the necessary distance to negotiate a safe clearance between the street or railroad car and the vehicle desiring to pass, which such speed shall not be deemed excessive, having due regard to the speed of the railroad or street-car, and that the speed on all streets and highways shall be a reasonable speed up to and not exceeding 25 miles an hour, but any speed beyond that shall be unreasonable, it is not negligent for a motorist in passing a street-car where there is a clearance to drive his car at any necessary speed up to 25 miles an hour.

Municipal Corporations—Injuries to Persons on Streets—Negligence.

2. A motorist for the purpose of passing a street-car increased the speed of his vehicle so that he was proceeding at a speed estimated as

*For authorities discussing the question of law governing automobiles, see comprehensive note in 1 L. R. A. (N. S.) 215; 4 L. R. A. (N. S.) 1130.

The question as to whether speed of automobiles on public streets is negligence, see notes in 25 L. R. A. (N. S.) 40; 38 L. R. A. (N. S.) 498.

Upon the question of reciprocal duty of operator of automobile and pedestrian to use care, see notes in 38 L. R. A. (N. S.) 487; 42 L. R. A. (N. S.) 1178; 51 L. R. A. (N. S.) 990.

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high as 18 miles an hour. The street was clear, and he could not see a young child standing behind a telegraph pole. Just as he was abreast the child it ran out and was struck by the rear fender, the motorist turning his vehicle into the car to escape an accident. *Held*, that the motorist was not liable for the resultant death of the child; for he was not driving at an excessive speed, but was lawfully proceeding in accordance with the express permission given by statute.

[As to law of the road as to automobile and street-car traveling in the same direction, see note in *Ann. Cas.* 1913E, 1121.]

From Multnomah: DAVID R. PARKER, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

The plaintiff, W. C. Sorsby, sues to recover damages from Paul Benninghoven, for the death of his four-year old son, alleged to have been caused by the defendant running his automobile upon the child. The allegations of the complaint charging negligence upon the defendant are these:

"That at all times mentioned herein the defendant was the owner of a certain automobile, and on the twentieth day of November, 1912, at about the hour of 5 o'clock P. M., was carelessly and negligently operating and driving said automobile while in an intoxicated condition, and while running south on East Fiftieth Street, between Hawthorne Avenue and East Harrison Street, in the City of Portland, Oregon, carelessly and negligently ran said automobile into the said Sherman Stanley Sorsby, thereby causing the death of the said Sherman Stanley Sorsby.

"That at the time said accident occurred the defendant was carelessly and negligently driving said automobile at a high rate of speed and operating said automobile in a careless and negligent manner, and carelessly and negligently failed to sound any signal when approaching the said Sherman Stanley Sorsby."

"That Ordinance No. 14,030, entitled 'An ordinance regulating the operation of and limiting the speed of automobiles' of the City of Portland, Oregon, provides

that at the place said accident occurred automobiles shall not be driven at a rate of speed to exceed — miles per hour, and the plaintiff believes, and therefore alleges, that the defendant at the time said accident occurred was driving said automobile at a rate of speed in excess of 25 miles per hour.”

We note in passing that the blank left in this averment for the rate of speed was never filled, and the ordinance referred to was not put in evidence, although the allegation was denied. The plaintiff claims general damages for loss of the services, society and comfort of the child in the sum of \$25,000, and special damage for burial expenses in the sum of \$180.50.

The ownership of the automobile is admitted, but all other allegations of the complaint are denied. An affirmative defense was to the effect that the death counted upon by the plaintiff was an unavoidable accident so far as the defendant is concerned; for, as he was driving along East Fiftieth Street in the City of Portland, the boy suddenly ran out in an attempt to cross the street, and struck the rear fender of the automobile, whereby he was killed.

The reply traverses the new matter of the answer. From a judgment upon a verdict in favor of the plaintiff, the defendant appeals.

REVERSED WITH DIRECTIONS.

For appellant there was a brief over the names of *Messrs. Moser & McCue, William A. Williams* and *Mr. Roy K. Terry*, with an oral argument by *Mr. Gus C. Moser*.

For respondent there was a brief over the names of *Mr. Cicero M. Idleman* and *Mr. Virgil A. Crum*, with an oral argument by *Mr. Idleman*.

In Banc. MR. JUSTICE BURNETT delivered the opinion of the court.

At the close of the plaintiff's case the defendant moved for a judgment of nonsuit on the ground that the plaintiff had failed to prove a case sufficient to be submitted to the jury. The overruling of this motion is assigned as one of the errors committed by the trial court. A review of the testimony on behalf of the plaintiff therefore becomes necessary.

Without dispute it appears that the defendant with two friends was riding in this automobile on Hawthorne Avenue following a "no-stop" train of two street-cars running east on Hawthorne Avenue and thence south on Fiftieth Street. The accident occurred on the latter street in the outskirts of Portland, where some of the cross-streets had not been improved. As the train came to a switch it slackened its speed, and the defendant turned out to the left as though to pass it. After passing the switch the trainmen increased the speed. The witnesses say that the automobile gained upon the train, and that this continued for about a block and a half when the accident occurred. All the witnesses testifying upon the question of speed gauged that of the automobile by reference to that of the train. H. B. Spaulding, a witness for the plaintiff, answering the question, "What rate of speed was the automobile making at that time?" said:

"The cars traveled from 15 to 20 miles an hour at that hour of the evening; and the automobile was going fast enough to pass the car. It was gaining on the car passing it on the left side."

S. E. True, a passenger on the train and a witness for the plaintiff, told about the automobile coming up behind and alongside the train, and said, speaking of the defendant:

“Well, to my best judgment he had followed us several blocks before we got to Fiftieth Street, where we turned. There he was half a car behind us, to my best memory; he was straddling the rail with his car. I think we slowed down at Fiftieth Street to open the switch, make the turn, and he also slowed down. After we turned on Fiftieth Street, he came right alongside of this back vestibule. I was chewing, and I came near spitting in his car a couple of times. He ran along a few feet, I didn’t pay much attention to it. Presently, he got out of sight alongside the car, and the next I knew the car got a bump, and I looked out to see what it was. I didn’t know what the accident was then.”

He said further:

“I should judge the car was— The rate of speed is kind of a hard thing to solve out; somewhere in the neighborhood of 14 or 16 miles; might have been 18 miles; might have been less; might have been more or less; might not have been over 12 miles.”

This witness was accustomed to riding on the car about 300 days in the year, and was familiar with the rate of speed. The motorman in charge of the train testified on behalf of the plaintiff that until he came to the frog at the crossing track he was traveling at the rate of probably 12 or 14 miles an hour, and when he came to cross over to the other track he slowed up to 7 or 8 miles. He says that he then speeded up to between 12 and 15 miles an hour, “maybe a little more, maybe a little less.” It is also without contradiction in the testimony on behalf of the plaintiff that the child stood on the sidewalk behind a telephone pole, where he was entirely out of sight of the defendant.

The evidence shows that the automobile was being driven along about 3 feet from the curb on one side and 3 or 4 feet from the train on the other. The witness Spaulding says:

"The little Sorsby boy was standing beside the post on the sidewalk at the time the car was opposite. He had been on the bank a moment before and stepped down on the sidewalk."

He declared that the rear fender of the automobile struck the child. The witness Doan was walking along the east side of the street going south at the time, and says:

"I noticed a couple of poles, saw some children playing around the poles, and I saw a little girl up a couple of feet on a telegraph pole; that is, before I got within 15 feet of the child. As I came up the walk I noticed this little girl climb up and down the pole, or on it. I also noticed some one run across the street from the opposite side, just ahead of the street-car and step up onto the curb, and as the street car went by, the tail end passed, I saw this child start out in the street, that is, just stepped out [witness claps his hands together], the automobile struck him."

He testified:

"I didn't see the automobile, only just as it struck the child and was gone. It was done as quick as that."

He said the child just jumped off the sidewalk to go across. He stated he thought he saw the child cross the street from the west side, and then continued:

"I saw him step up behind the post. Whether he came clear across the street or not, I don't know, but my supposition was he ran across ahead of the street-car, and stepped up behind the post, and when the car went by he started to go back."

This question was propounded to him:

"And it is still your judgment that from where the boy was standing that Mr. Benninghoven, driving the automobile, could not see him until he ran out into the street?"

He answered:

"It is. He couldn't see him until the boy stepped out from the pole. I couldn't see him from where I was."

The testimony also shows that at the very moment of the accident the defendant turned his car to the right, away from the child, so that he collided with the train, and that it was the rear fender of the automobile that struck the little fellow.

1, 2. On the question of intoxication but one witness states anything connected therewith, and he avers that immediately after the accident in talking with the defendant he smelled liquor on his breath, but no one says that the defendant was intoxicated.

Recurring to the allegation of negligence, we find it couched in these terms:

"The defendant was carelessly and negligently driving said automobile at a high rate of speed, and operating said automobile in a careless and negligent manner, and carelessly and negligently failed to sound any signal when approaching the said Sherman Stanley Sorsby."

Under Section 2 of Chapter 174 of the Laws of 1911, known as the Motor Vehicle Law, certain specifications are laid down regarding the speed of vehicles. Subdivision 11 reads thus:

"In passing railroad or street-cars operated in any city, town or village in this state, vehicles shall be so operated upon that side of said street or railroad car with due care and caution that the safety of passengers boarding or alighting from such street or railroad car shall be fully protected, and for that purpose

said vehicle shall be brought to a stop, if necessary, but upon the other or left side of said street or railroad car, should there be a clear passage, said vehicle shall be permitted to so increase its speed for the necessary distance to negotiate a safe clearance between said street or railroad car and said vehicle so desiring to pass, and the rate of speed requisite and necessary so to do shall not be deemed to be an excessive rate of speed, having due regard to the speed of said railroad or street-car."

Subdivision 17 is as follows:

"The rate of speed on all streets, roads and highways of this state shall be a reasonable speed up to and not exceeding twenty-five miles an hour, but any speed in excess of twenty-five miles an hour upon any road or highway of this state shall be an unreasonable speed and is prohibited by this act."

If the plaintiff had alleged the rate of speed allowed by the city law, and had met the general issue on that point by introducing the ordinance with proof that the defendant was going faster than the permissible maximum, the result would have been a situation to which could have been applied the doctrine of the majority opinion in *Kalich v. Knapp*, 73 Or. 558 (142 Pac. 594, 145 Pac. 22, Ann. Cas. 1916E, 1051), to the effect that violation of a city ordinance, although it conflicts with an act of the legislative assembly is evidence of negligence. In default of these conditions, however, that case does not apply, and the present controversy is judicable by the state statute mentioned.

The highest rate of speed attributed to the street-car by any witness is found in the testimony of Mr. Spaulding that the car traveled 15 to 20 miles an hour, and that the automobile was gaining on it. The enactment referred to says that the speed requisite and necessary to pass the car shall not be deemed to be an

excessive rate. This, of course, must be taken in connection with the other provision prescribing a maximum of 25 miles an hour. Nothing further is shown on the question of the rate at which the automobile was traveling than that it was gaining on the car. This would be true if it was going only 21 miles an hour. Admittedly there may and often will be cases when it would be gross negligence to move an automobile at all; but in a situation defined by the statute, nothing else being shown, the motorist is entitled to travel as the law permits. All the testimony for the plaintiff, however, shows that the street was clear when Benninghoven turned out to pass the train. The child was not in sight, but, on the contrary, was concealed behind the telegraph pole. There was nothing whatever to intimate his presence to the defendant, and, even if the latter had known that the little one was standing on the curb by the telegraph pole, still the fact would have remained that he was in a place of safety.

The way was clear to the driver of the automobile. He was doing what the statute expressly permits him to do, and he was doing it in a lawful manner without any suggestion of the presence of the boy. The little fellow stepped out into the street, and had but 3 or 4 feet to traverse before he collided with the defendant's vehicle. Considering the matter most favorably for the plaintiff, it is plain that, in order to avoid the collision, the defendant would have had to travel at least the length of his machine before the child covered the 3 or 4 feet. Under such circumstances, with the appliances at hand, no human agency could have stopped the automobile in time to prevent the accident. The defendant did everything within his power to avoid the child, turning his car so far to

the right that he collided with the train. The misfortune would have happened if the automobile had been going only 5 miles an hour. To hold the defendant liable in those conditions would be tantamount to making him an absolute insurer against all manner of casualties happening to anyone on the street while he was passing.

The case presented is like the hypothesis suggested by Mr. Chief Justice BEAN in *Wallace v. Suburban Ry. Co.*, 26 Or. 174, 177 (37 Pac. 477, 478, 25 L. R. A. 663):

"If we assume, as does the argument for the defendant, that the child, without the fault or negligence of the defendant, suddenly and unexpectedly appeared on the track immediately in front of the car, we might conclude that her death was an unavoidable accident, and that the rate of speed would be immaterial, for upon such an appearance upon the track no precaution could have prevented the accident."

In that case the court refused to apply the principle thus announced by the learned judge because the facts were in controversy. Here there is no dispute on that score. It is unquestioned that the child hitherto concealed by the pole suddenly and unexpectedly stepped out into the street evidently alongside of, and not in front of, the automobile and collided with the back fender. So far as the speed is concerned, the pity is that the defendant was not driving at a much greater rate; for then he might have escaped the baby's impact.

On the subject of failure to give an alarm Mr. Chief Justice MAIRE, writing in *Graham v. Consolidated Traction Co.*, 64 N. J. Law, 10, 13 (44 Atl. 964, 965), says:

"The clear evidence is that the boys, in their play on the sidewalk, gave no indication that they intended to cross the track. No signal nor warning as to them would have been appropriate or required. When they rushed from the sidewalk and ran directly in front of

the car, the motorman made every effort to arrest the motion of the car. The car was visible and visibly moving; the signal by the gong would have been of no avail. From the evidence an inference of failure of duty in this respect could not reasonably be drawn."

In that instance the decedent was a boy of four years and four months of age whom the motorman saw playing on the sidewalk adjacent to the street on which the car was passing. The present case is much stronger because the little fellow was concealed from the view of the defendant and gave no intimation that he was moving, or likely to move. In *Stahl v. Sollenberger*, 246 Pa. 525 (92 Atl. 920), a little boy suddenly ran from the footway on a bridge into the driveway provided for vehicles and was killed. The court said:

"The defendant cannot fairly or reasonably be charged with negligence in failing to stop his automobile and avoid the accident, unless it appeared that the boy entered the roadway at a sufficient distance from the automobile to permit of its being stopped before the collision occurred. If the boy suddenly left the footway, at a place where the driver had no reason to expect him to do so, and ran directly in front of the automobile, the result could hardly have been other than disastrous, even though the machine had been moving at a very reasonable rate. * * But in the present case, with no evidence that the child appeared upon the roadway in front of the car at any appreciable distance ahead of it, and with no circumstance shown that would tend to suggest to the driver, prior to the happening of the accident, the probability of the boy leaving the footway, or getting into danger upon the driveway, we think the trial court was right in holding that there was not sufficient proof of any negligence causing the accident, on the part of the defendant, to justify the submission of the question to the jury."

Other instructive precedents are *Curley v. Baldwin* (R. I.), 90 Atl. 1; *Hyde v. Hubinger*, 87 Conn. 704 (87 Atl. 790); *Paul v. Clark*, 161 App. Div. 456 (145 N. Y. Supp. 985); *Perry v. Macon Consolidated St. Ry. Co.*, 101 Ga. 400 (29 S. E. 304, 3 Am. Neg. Rep. 755); *Winter v. Van Blarcom*, 258 Mo. 418 (167 S. W. 489).

In brief, the allegation of excessive speed is not proven when measured by the motor vehicle law, which is the legislative standard. Owing to the admitted suddenness with which the child appeared from his concealment behind the pole, the accident was unavoidable, and the rate of speed therefore became immaterial, because, no matter how fast or slow the defendant was traveling, there was no time after he discovered the child that he could have stopped the car soon enough to avoid hurting him. On the contrary, the evidence for the plaintiff affirmatively shows that by swerving to the right all was done that was humanly possible under the circumstances to prevent injury to the boy. Considering the statute and giving to the plaintiff every inference that can be drawn from his own testimony, he has not proven any legal blame against the defendant. The loss of his sprightly little son is no doubt a severe affliction to the parent, but it does not justify the visitation of a money judgment upon the defendant. It is unnecessary to consider the other questions raised by the appeal.

The judgment of the Circuit Court is reversed, with directions to enter a judgment of nonsuit in favor of the defendant.

REVERSED WITH DIRECTIONS.

MR. JUSTICE EAKIN absent.

MR. JUSTICE BEAN dissents.

MR. JUSTICE HARRIS concurs in the result.

Argued July 6, reversed and remanded September 12, rehearing denied December 27, 1916.

ANDERSON v. STAYTON STATE BANK.*

(159 Pac. 1033.)

Bankruptcy—Preference—Recovery by Trustee.

1. Where the enforcement of a judgment obtained against a bankrupt works a preference within the meaning of the Bankruptcy Act (Act Cong. July 1, 1898, c. 541, 30 Stat. 544), the trustee in bankruptcy is entitled to recover from the judgment creditor the amount received on the judgment.

Bankruptcy—Preference—Trustee's Action to Set Aside—Grounds.

2. A trustee in bankruptcy cannot question a judgment against the bankrupt unless he alleges and proves his right to appear as the trustee in bankruptcy, which involves the filing of a petition in bankruptcy, an adjudication, his appointment, and his qualification as trustee of the bankrupt.

Bankruptcy—Petition—Sufficiency.

3. An involuntary petition in bankruptcy, setting forth at least one act of bankruptcy within the definition of Bankruptcy Act, Section 3a (U. S. Comp. Stats. 1913, § 9587), and averring that a judgment was obtained by a bank, and that the judgment creditor attached funds and realized on the judgment in full, was sufficient as against attack by such judgment creditor, the defendant in the trustee's action to set aside such judgment as a preference.

Bankruptcy—Adjudication—Subpoena—Presumption.

4. An adjudication in bankruptcy of itself imports the existence of all the requisite jurisdictional facts, including the service of a subpoena, especially in a collateral attack.

Bankruptcy—Election of Trustee—Record.

5. A record, which gave the title of the cause in bankruptcy, and recited that at the time and place for the first meeting creditors appeared by one having a majority of claims in number and amount of those presented for approval, who nominated and elected plaintiff as trustee, in the absence of any showing that the trustee was elected wrongfully, sufficiently showed, for the purpose of plaintiff's action as trustee to set aside an alleged preference to the defendant, that plaintiff was selected in full compliance with Bankruptcy Act, Section 5b (U. S. Comp. Stats. 1913, § 9589).

*Authorities on the question as to whether or not judgment obtained within the four month period, as affected by Section 60, subdivisions a and b, and Section 67, subdivisions c and f, of the Bankruptcy Act, shall be deemed a preference as against other creditors, are gathered in a note in 41 L. E. A. (N. S.) 204.

Bankruptcy—Trustee's Bond—Title.

6. The approval of the bond of a trustee in bankruptcy constitutes, under Bankruptcy Act, Section 21e (U. S. Comp. Stats. 1913, § 9605), conclusive evidence of the vesting of the title of the bankrupt's property in him.

Bankruptcy—Preference—Trustee's Action to Set Aside—Grounds.

7. Under Bankruptcy Act, Sections 60a, 60b, as amended (U. S. Comp. Stats. 1913, § 9644), authorizing a trustee in bankruptcy to set aside a preference, the trustee in such action must show that the debtor was insolvent at the time of the entry of the judgment; that he suffered the judgment to be entered within four months of the filing of a petition in bankruptcy; that the enforcement of the judgment obtained for the judgment creditor a greater percentage of its debt than any other creditor of the same class; and that the judgment creditor had reasonable cause to believe that the effect of such judgment was to give a preference within the meaning of the Bankruptcy Act.

Bankruptcy—Preference—Judgment—Time.

8. In an action by a trustee in bankruptcy to set aside an alleged preference, the suffering of a judgment to be entered within four months before the filing of the petition in bankruptcy was established by showing that all the proceedings from the commencement of the judgment creditor's action to the entry of its judgment, including the issuance and return of the execution and the enforced payment of the judgment, occurred within four months before the filing of the petition.

Bankruptcy—Preference—Class—Notes.

9. Claims against a partnership and claims against one of the partners were not in the same class as the notes signed by such partner and the other partner in their individual names in adjustment of a claim against the partnership, in respect to a preference alleged to have been obtained by the holder of such notes.

Bills and Notes—Form—Joint Note.

10. Notes containing the language, "We promise to pay to the order of" the payee, signed by a lumber company and by each of the partners doing business under such firm name, were "joint notes."

[As to liability of partnership on note executed in name of a single partner, see note in Ann Cas. 1912A, 618.]

Bills and Notes—Form—"Joint and Several Note."

11. Notes executed in adjustment of a claim against a partnership doing business under the firm name and style of a company, after the time for payment had been extended and the firm had paid the interest, signed by each of the partners, were "joint and several notes" within Section 5850, L. O. L., declaring certain notes to render the signers jointly and severally liable thereon.

Bills and Notes—Joint and Several Note—Liability—Consideration.

12. Where joint and several notes executed by the partners of a firm originated in a partnership indebtedness to a third party, the extension of time for the payment of such indebtedness granted by the creditor's assignee furnished a sufficient consideration for the lia-

bility which the individual partners incurred when they signed such notes.

Partnership—Joint and Several Note—Payment—Fund.

13. The individuals constituting a partnership signing joint and several notes were jointly and severally liable, and the payee might look to their individual assets for payment, or to the partnership estate for payment, where the notes arose out of a partnership indebtedness.

Bankruptcy—Partnership—Joint and Several Notes—Claim.

14. The holder of joint and several notes executed by the individuals composing a partnership in the adjustment of a partnership debt might share with claims against the partnership in bankruptcy and at the same time participate in dividends upon claims against the individuals, on the theory that the notes represented a firm indebtedness and at the same time a primary individual obligation.

Bankruptcy—Individual and Partnership Liabilities—Class.

15. Such holder would be obliged to share with creditors of the same class holding claims against one of the individual partners, but could compel the payment of its notes in full before any dividends were paid out of the individual estate on pure partnership debts, even though there were no firm assets; the course to be pursued being regulated by Bankruptcy Act, Section 5f (U. S. Comp. Stats. 1913, § 9589), declaring that the net proceeds of partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts, and that the surplus of the property of any partner after paying his individual debts should be added to the partnership assets and applied to partnership debts, and the surplus of partnership property, after payment of debts, shall be added to the assets of the individual partners.

Partnership—Indebtedness—Payment.

16. A partnership debt is primarily the obligation of the partnership, and secondarily the obligation of the individuals composing it, and, therefore, the liability of the individual is contingent, and partnership assets must be exhausted before he is obliged to pay out of his own estate.

Partnership—Joint Note—Liability of Partners and Partnership.

17. Joint notes, on their face purporting to be the obligation not only of a partnership as such, but also of the individual partners whose names appeared thereon with the name of the firm, were intended to give the holder not only the security afforded by the partnership, but the security of the individual signers; the fact that the notes were joint not necessarily implying that they were the debt of none of the signers except the partnership, and the joint notes of the partners for a debt in no way connected with the partnership, not making them a primary claim against the partnership merely because it was joined.

Contracts—Joint and Several Contract—Liability of Promisor.

18. A joint and several contract is with each promisor and also with all jointly, with the result that they are all jointly liable, and each

individual is liable upon his separate obligation, and they may be sued jointly or severally as the promisee may elect.

Contracts—Judgment—Joint Contract—Nature of Obligation.

19. A joint contract is with all the promisors together, with the result that all must be sued jointly if either promisor objects to a suit or action brought against less than all; but, if a judgment is obtained without objection against less than all who are jointly liable, the entire debt is merged in the judgment.

Execution—Joint and Several Note—Judgment—Satisfaction.

20. A judgment against joint and several promisors does not give the judgment creditor any rights for the collection of the debt not possessed by the owner of the judgment against persons who are merely joint debtors, and who have been served with summons, though the judgment debtor may seize the property of all or the property of each if he chooses, and is not obliged to look to one before he calls upon the other for payment.

Execution—Joint Note—Judgment—Satisfaction.

21. Where all the promisors on a joint obligation are served with summons and a judgment secured against them, the judgment creditor is not obliged to exhaust the joint property before seizing the separate property of the individual promisors, because he may do so as he chooses, since a joint obligor is liable *in solido* for the whole debt.

Execution—Judgment—Joint Obligors—Satisfaction—Statutes.

22. Under Section 61, L. O. L., prescribing how the plaintiff may proceed when the action is against two or more defendants when a summons is served upon one or more, but not all of them; Section 181 providing for judgment against one or more of several defendants, and Section 188 providing for judgment against several defendants on the confession of one, plaintiff, though service cannot be obtained on all those jointly liable on a contract, may have judgment against all, and may satisfy it with the joint property of all the promisors, or the individual property of the several promisors who have been served with summons, and is not obliged to exhaust the joint property before calling upon the separate estates for payment.

Bankruptcy—Claims—Class.

23. In bankruptcy a pure partnership creditor is not in the same class as a creditor holding a claim against an individual member of the partnership.

Bankruptcy—Claims—Preference—"Class."

24. Under Bankruptcy Act, Sections 60a, 60b, as amended, relating to preferences as between creditors of the same class, the term "class" defines those creditors who are entitled to receive out of the bankrupt estate the same percentage of their claims, however much they may have the right to collect from others than the bankrupt, so that in the bankruptcy proceeding of a partnership and both of its members, joint notes signed by the partnership and by each of the partners in the order named, and joint and several notes signed by the partners in adjustment of a partnership debt, belonged to the fourth class of credi-

tors of a partner entitled to the same percentage of dividends, and the enforcement of a judgment on the joint and several notes would work a preference and entitle the trustee to recover from such creditor the amount received on the judgment.

From Marion: **PEBOY R. KELLY**, Judge.

Department 2. Statement by **MR. JUSTICE HARRIS**.

This is an action by **A. J. Anderson**, as trustee in bankruptcy of the estate of **Roy H. Wassom** and **M. A. McLaughlin**, partners, doing business under the firm name and style of the **Salem Lumber Company**, and as trustee of the estate of **Roy H. Wassom** and **M. A. McLaughlin** individually, against the **Stayton State Bank**.

Claiming that within the meaning of the **National Bankruptcy Act** a preference was effected when the defendant received \$730.32 in satisfaction of a judgment against **Roy H. Wassom** and **M. A. McLaughlin**, the plaintiff, as trustee in bankruptcy, is attempting to recover that amount from the defendant. The **Stayton State Bank** is a corporation and, as its name implies, is doing a banking business. The **Salem Lumber Company** is a partnership, with **Roy H. Wassom** and **M. A. McLaughlin** as the partners composing the firm.

The **Gooch Lumber Company** sold some lumber to the partnership, with an understanding "as to additional time other than the regular sixty day terms." The seller assigned the invoices for the lumber to the defendant, for the reason that the former wished immediately to realize money on the sale. The defendant presented the invoices for payment when they became due. The partnership was not able to pay, but an adjustment was made on March 6, 1914, by the bank extending the time for payment and the firm paying the interest on the account to that date, and

by Roy H. Wassom and M. A. McLaughlin signing four joint and several promissory notes for the aggregate sum of \$635, the amount due on the invoices, payable to the Stayton State Bank. The notes having matured and being unpaid, the bank commenced an action on the four notes against Wassom and McLaughlin on July 16, 1914, in the Circuit Court for Marion County. An attachment was levied on July 18th, on funds which M. A. McLaughlin had to his credit in the United States National Bank of Salem. A judgment was entered on July 30, 1914, against Wassom and McLaughlin for the amount of the notes, attorney fees, with costs and disbursements, and an order was made, directing that the attached funds be applied in satisfaction of the judgment. On the following day, July 31st, an execution was issued on the judgment, and the sheriff promptly returned the execution together with \$730.32 of the attached funds which he delivered to the clerk; and on August 15, 1914, the county treasurer paid the entire sum to the Stayton State Bank in satisfaction of the judgment. A petition in involuntary bankruptcy was filed on September 12, 1914, against the partnership, and also against Roy H. Wassom and M. A. McLaughlin individually, and they were all adjudged bankrupts. A. J. Anderson was elected trustee in bankruptcy for the bankrupts, and on October 31, 1914, he qualified as such trustee. Wassom has no assets, and the property of the partnership will not meet its liabilities.

The plaintiff alleges that at and prior to the time when the defendant obtained its judgment it had reasonable cause to believe that Wassom, McLaughlin and the partnership were insolvent, "and that the enforcement of such judgment would effect a preference and would cause a diminution of the assets of said

bankrupts and each of them to the exclusion of the rights of other creditors of said bankrupts, and particularly of creditors of same class"; and "that defendant knew at the time it received said \$730.32, and for a long time prior thereto, that the same would constitute a preference."

The defendant denies that it had reasonable cause to believe that either the partnership or the persons composing it were insolvent; and the bank alleges that the enforcement of its judgment "will not enable this defendant to obtain a greater percentage of its claim than any other of the creditors of said M. A. McLaughlin of the same class." A trial resulted in a judgment of nonsuit, and the plaintiff appealed.

REVERSED AND REMANDED.

For appellant there was a brief with oral arguments by *Mr. Walter E. Keyes* and *Mr. Frederick S. Lamport*.

For respondent there was a brief over the names of *Mr. Samuel T. Richardson* and *Mr. W. E. Richardson*, with an oral argument by *Mr. Samuel T. Richardson*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1, 2. If the enforcement of the judgment, which the Stayton State Bank obtained against Roy H. Wassom and M. A. McLaughlin, worked a preference within the meaning of the Bankruptcy Act, then the trustee in bankruptcy would be entitled to recover from the bank the sum of \$730.32, which it received on its judgment. The plaintiff, however, cannot question the judgment unless he first alleges and proves his right to appear as the trustee in bankruptcy, which in-

volves: (a) The filing of a petition in bankruptcy; (b) the adjudication; (c) the appointment of plaintiff; and (d) the qualification as trustee of the bankrupt: 2 Loveland, Bankruptcy (4 ed.), § 545.

3. An involuntary petition in bankruptcy was filed by three creditors. While the petition is not as full as it might be, yet it contains enough to meet the objection of insufficiency made by the defendant. Form No. 118, found in Collier on Bankruptcy (9 ed.), page 1228, seems to have been taken as the model for drafting the petition. At least one act of bankruptcy within the definition of Section 3a of the Bankruptcy Act is set forth: 30 U. S. Stats. at Large, 546. The petitioners aver, not only that a judgment was obtained by the Stayton State Bank, but also that the judgment creditor attached funds and realized on the judgment in full. The petition challenged here did more than merely to allege the rendition of a judgment, and it is therefore unlike the petition condemned in *Re Pressed Steel Wagon Goods Co.* (D. C.), 193 Fed. 811. The petition contains sufficient allegations to render it invulnerable to attack here, and the defendant cannot take advantage of mere defective allegations: 1 Remington, Bankruptcy (2 ed.), page 366.

4. The defendant is insisting that the adjudication is inoperative, because the record does not show the service of a subpoena as required by the Bankruptcy Act. The answer to this objection is that the record does not affirmatively show that a subpoena was not served. There was an adjudication, and this of itself imports the existence of all the requisite jurisdictional facts, especially in a collateral attack: 1 Remington, Bankruptcy (2 ed.), pp. 364, 386; *Huttig Mfg. Co. v. Edwards*, 20 Am. Bank. R. 349, 160 Fed. 619 (87

C. C. A. 521); 2 Remington, Bankruptcy (2 ed.), p. 1651.

5. The validity of the appointment of the trustee is also challenged. After giving the title of the cause and reciting that, "this being the time and place for the first meeting of creditors in the above matter in bankruptcy," the record of the first meeting of creditors states that creditors appeared by Fred Lamport "who having a majority of claims in number and amount of those presented for approval, nominated and elected Mr. A. J. Anderson of Salem, Oregon, as trustee." The defendant has not shown that the trustee was selected wrongfully, and the record contains no intimation that the trustee was elected by persons who were not creditors of the partnership. The recital of the appointment sufficiently shows for the purpose of this litigation, especially in the absence of any evidence to the contrary, that the trustee of the partnership estate was selected in full compliance with Section 5b of the Bankruptcy Act: 2 Remington, Bankruptcy (2 ed.), § 1736.

6. A certified copy of an order shows that the bond of the trustee was approved, and therefore, in the language of Section 21e of the Bankruptcy Act, it "shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt": 30 U. S. Stats. at Large, 552; Collier, Bankruptcy (9 ed.), 462.

7. The plaintiff has alleged the requisite facts to entitle him to sue as the trustee in bankruptcy, and he has also offered evidence in support of each of these allegations. It is not enough, however, for the plaintiff to show that he has authority to appear as the trustee of the bankrupt, but he must also allege and prove all the statutory elements of a preference before he can recover from the defendant: 2 Loveland, Bank-

ruptcy (4 ed.), § 545; 2 Remington, Bankruptcy (2 ed.), § 1762. We must look to the statute itself for a definition of the acts which are condemned as preferences, and on that account we here set down all that part of Section 60 of the National Bankruptcy Act which is material to this controversy and as it now reads:

“(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, * * and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required”: Act Cong. Feb. 5, 1903, c. 487, § 13; 32 U. S. Stats. at Large, p. 799.

“(b) If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of

bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction": Act Cong. June 25, 1910, c. 412, § 11; 36 U. S. Stats. at Large, p. 842.

An analysis of the quoted statute will reveal that, to establish a preference, the trustee in the instant litigation must show: (1) That the debtor was insolvent at the time of the entry of the judgment; (2) that the debtor suffered the judgment to be entered within four months before the filing of the petition; (3) that the enforcement of the judgment secured by the Stayton State Bank against Wassom and McLaughlin obtains for the bank a greater percentage of its debt than any other creditor of the same class; and (4) that the bank or its agent had reasonable cause to believe that the effect of such judgment was to give a preference within the meaning of the acts of Congress relating to bankruptcy: 2 Loveland, Bankruptcy (4 ed.), § 545; *In re F. M. & S. Q. Carlile* (D. C.), 199 Fed. 612; *Painter v. Napoleon Tp.* (D. C.), 156 Fed. 289.

8. Much is said in the briefs concerning the first and fourth elements of a preference, but it is sufficient here to say that the plaintiff offered enough evidence to entitle him to go to the jury on these two questions. The second element of a preference is established, because all the proceedings from the commencement of the action by the Stayton State Bank against Wassom and McLaughlin to the entry of the judgment, including the issuance and return of the execution and the enforced payment of the judgment with moneys belonging to McLaughlin individually, occurred within four months before the filing of the petition: 2 Remington, Bankruptcy (2 ed.), § 1384½; *Brandenburg,*

Bankruptcy (3 ed.), § 949; Collier, Bankruptcy (9 ed.), p. 800; 1 Loveland, Bankruptcy (4 ed.), p. 323. The third essential element of a preference will now require attention.

9. The defendant contends that there is no evidence of any claim which would be entitled to be paid before or even to share with the judgment obtained against Wassom and McLaughlin. The plaintiff insists that the claim held by the Stayton State Bank did not stand in a class by itself, but that there are other creditors whose claims are entitled to share with the bank in the funds belonging to the individual estate of M. A. McLaughlin. During the trial the plaintiff offered, but the court refused to receive in evidence, a large number of claims, some of which were against Wassom individually, while the remainder were against the partnership. Three notes owned by the Silverton Lumber Company were received in evidence. Each of these three notes says that, "We promise to pay to the order of the Silverton Lumber Company," and is signed by the Salem Lumber Company, Roy H. Wassom and M. A. McLaughlin in the order named. The court also received in evidence the four notes upon which the defendant secured its judgment against Wassom and McLaughlin. Each of these four notes states that, "I promise to pay to the order of Stayton State Bank," and is signed by Roy H. Wassom and M. A. McLaughlin. When the judgment of nonsuit was granted, four groups of claims had been brought to the attention of the court: (1) Claims against the partnership; (2) claims against Wassom; (3) the three notes held by the Silverton Lumber Company; and (4) the four notes executed to the Stayton State Bank. The claims belonging to the first two groups were not received in evidence, nor can it be urged that they are

in any sense in the same class as the notes given to the Stayton State Bank. The notes representing the third and those falling in the fourth group are in evidence, and the main contest centers around these two groups of claims, with the defendant strenuously urging that the Silvertown Lumber Company is not a creditor of the same class as the bank and plaintiff striving to maintain his position that the bank is not a creditor of a class different from the Silvertown Lumber Company.

10, 11. The notes held by the Silvertown Lumber Company are joint: 7 Cyc. 653. The instruments executed to the Stayton State Bank are joint and several obligations: 7 Cyc. 656; Section 5850, L. O. L.; *Noble v. Beeman-Spaulding-Woodward Co.*, 65 Or. 93, 106 (131 Pac. 1006, 46 L. R. A. (N. S.) 162).

12-14. This controversy presents a situation where a partnership and both its members are in bankruptcy; the Silvertown Lumber Company notes are joint, while the Stayton State Bank notes are joint and several; the joint notes are signed by the partnership and also by the individuals who compose the partnership, but the joint and several notes are signed by the individuals only; the evidence shows that the joint and several notes are founded on a partnership debt, but the record does not disclose the origin of the joint notes; the joint and several notes have been paid with funds belonging to one of the individual signers, while no payments have been made on the joint notes; and therefore the question for discussion is whether the joint notes are in the same class as the joint and several notes within the purview of the National Bankruptcy Act.

An understanding of the *status* of the Silvertown Lumber Company or joint notes can best be reached

by first noticing the different funds which may be made available for the payment of the Stayton State Bank or joint and several notes. The origin of the joint and several notes is found in the indebtedness of the partnership to the Gooch Lumber Company, but the extension of time for the payment of that indebtedness furnished a sufficient consideration for the liability which the individuals incurred when they signed those notes: *Merchants' Bank v. Thomas*, 121 Fed. 306 (57 C. C. A. 374). The individuals who signed the joint and several notes are jointly and severally liable, and therefore the payee can look to the individual estates of Wassom and McLaughlin for payment, or, if it wishes, the bank may look to the partnership estate for payment, for the reason that the evidence shows that the notes arose from an indebtedness of the Salem Lumber Company to the Gooch Lumber Company. Under all the authorities the Stayton State Bank can elect to share in the partnership assets, since the notes held by it spring from a partnership indebtedness and are signed by the persons composing the firm, or the bank may, if it chooses, look to the individual estates of Wassom and McLaughlin, or either of them, for payment, since they have signed their own names as individuals. In the instant case the bank exercised an indubitable right when it elected to call upon the individual property of McLaughlin for payment. While it is not necessary to decide whether the Stayton State Bank could share in the assets of both the partnership and the individual estates, yet it is not going far afield to say that these notes can share with claims against the partnership and at the same time participate in dividends with claims against the individuals on the theory that the notes in truth represent a firm indebtedness, and at the same time evidence a

primary individual obligation: *Ex parte Nason*, 70 Me. 363; *In re Bucyrus Mach. Co.*, 5 N. B. R. 303 (Fed. Cas. No. 2100); *Stephenson v. Jackson*, 9 N. B. R. 255 (Fed. Cas. No. 13,374); *In re Bradley*, 2 Biss. 515 (Fed. Cas. No. 1772); *In re McCoy*, 17 Am. Bank. R. 760 (150 Fed. 106, 80 C. C. A. 60); *Winslow v. Wallace*, 116 Ind. 317 (17 N. E. 923, 1 L. R. A. 179); *Mock v. Stoddard*, 24 Am. Bank. R. 403 (177 Fed. 611, 101 C. C. A. 237); *In re Thomas*, 8 Biss. 139 (Fed. Cas. No. 13,886); *Matter of Gray*, 111 N. Y. 404 (18 N. E. 719); 5 Cyc. 417.

15, 16. While the Stayton State Bank would be obliged to share with creditors of the same class holding claims against McLaughlin as an individual, still the bank can compel the payment of its notes in full before any dividends are paid out of the individual estate on pure partnership debts, even though there are no firm assets: *In re Knowlton & Co.*, 202 Fed. 480 (120 C. C. A. 610); *In re Telfer*, 184 Fed. 224 (106 C. C. A. 366); *In re Janes*, 133 Fed. 912 (67 C. C. A. 216); *In re Henderson* (D. C.), 142 Fed. 588; *In re Hull* (D. C.), 224 Fed. 796; *Farmers' Bank v. Ridge Ave. Bank*, 240 U. S. 498 (60 L. Ed. 767, 36 Sup. Ct. Rep. 461.) A pure partnership debt is primarily the obligation of the firm, and secondarily the obligation of the individuals composing the firm, and therefore the liability of the individual is contingent, and hence partnership assets must be exhausted before a member of the firm is obliged to pay out of his own estate. To the primary partnership liability the persons composing the partnership have, by signing their names to the Stayton State Bank notes as individuals, added a primary personal liability, so that both the partnership and the persons composing it are primarily liable, and therefore on principle the Stayton State Bank is

empowered to look to McLaughlin, if it chooses, for payment of its notes to the exclusion of debts incurred by the partnership standing alone. Moreover, Section 5 of the Bankruptcy Act points out the course to be pursued by declaring that:

“(f) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership”: 30 U. S. Stats. at Large, p. 548.

17. The defendant argues that the Silverton Lumber Company notes stand in the same relation to the Stayton State Bank notes as a pure partnership debt, and that therefore the former cannot call for dividends out of the individual estate of McLaughlin until the bank notes are first paid in full. If the joint notes occupy the same position as a note signed by the partnership only, then the conclusion contended for by the defendant is inevitable. There is no evidence of the origin of the Silverton Lumber Company notes. The defendant urges, however, that *prima facie* these notes represent a partnership debt, because the name of the firm appears as one of the makers of the paper; but by the same token the paper is *prima facie* the obligation also of the individuals who signed because their names appear in addition to the names of the partnership: 2 Remington, Bankruptcy (2 ed.), §§ 2240, 2263. On its face each of the Silverton Lumber Com-

pany notes purports to be the obligation, not only of the partnership as such, but also of the individuals whose names appear with the name of the firm. It is at least fair to assume that the parties intended that the holder of the notes would have, not only the security afforded by the partnership as such, but the contemporaneous security furnished by the individuals. The fact that the note is joint does not necessarily imply that it is the debt of none of the signers except the partnership. The joint note of Wassom and McLaughlin for a debt in no way connected with the partnership would not make it a primary claim against the partnership merely because the partnership is joint: 2 Remington, Bankruptcy (2 ed.), § 2244. On the record as it is presented to us the notes held by the Silverton Lumber Company must be deemed to be the joint notes of the partnership considered as such, and of Wassom and McLaughlin regarded as individuals, because that is exactly what the paper purports to be: *Hosmer v. Burke*, 26 Iowa, 353. The final chapter of this contest presents a conflict between joint and several notes on the one hand and joint notes on the other, and for that reason it will be proper to note some of the characteristics of each kind of obligation, as well as the difference between them.

18-21. A joint and several contract is with each promisor and also with all jointly, with the result that they are all liable together on the joint obligation, and each individual is liable upon his separate obligation, and they may be sued jointly or severally as the promisee may elect: 9 Cyc. 657. A joint contract, however, is with all the promisors together, with the result that all must be sued jointly if either promisor objects to a suit or action brought against less than all; but if a judgment be obtained without objection against less

than all who are jointly liable, the entire debt is merged in that judgment: *Ryckman v. Manerud*, 68 Or. 350 (136 Pac. 826, Ann. Cas. 1915C, 522). Ordinarily, a release of one frees all: 9 Cyc. 654. Although a promisee may sue all or only one of two or more joint and several promisors, nevertheless a judgment obtained against joint and several promisors does not give to the judgment creditor any rights for the collection of the debt which are not possessed by the owner of a judgment against persons who are merely joint debtors and who have been served with summons. The owner of a judgment against persons who are jointly and separately liable may seize the property of all or the property of each if he chooses, and he is not obliged to look to one before he calls upon the other for payment. If all the promisors on a joint obligation are served with summons and a judgment secured against them, then the owner of the judgment is not obliged to exhaust the joint property before seizing the separate property of the individual promisors because he may do as he chooses (*Godfrey v. Gibbons*, 22 Wend. (N. Y.) 569; *West Duluth Land Co. v. Bradley*, 75 Minn. 275 (77 N. W. 964); *Low v. Adams*, 6 Cal. 277; 17 Cyc. 1082), for the reason that in a joint, as well as in a joint and several, obligation each obligor who is bound at all is liable *in solido* for the whole debt: 9 Cyc. 653; *Allin v. Sharburne's Exr.*, 1 Dana (Ky.), 68 (25 Am. Dec. 121); *Ripley v. Crooker*, 47 Me. 370 (74 Am. Dec. 491); *Dumanoise v. Townsend*, 80 Mich. 302 (45 N. W. 179); *Alpaugh v. Wood*, 53 N. J. Law, 638 (23 Atl. 261); *Gray v. Rollo*, 18 Wall. 629 (21 L. Ed. 927).

22. Even though service cannot be obtained on all those who are jointly liable on a contract, still our statutes authorize the court to permit the promisee to

have a judgment against all, and he may satisfy that judgment with the joint property of all the promisors or the individual property of the separate promisors who have been served with summons, and, furthermore, the judgment creditor is not obliged to exhaust the joint property before calling upon the separate estates for payment: Sections 61, 181 and 188, L. O. L.; *Stivers v. Byrkett*, 56 Or. 565, 571 (108 Pac. 1014, 109 Pac. 386); *Bertin & Lepori v. Mattison*, 80 Or. 354 (157 Pac. 153).

23. While it is true that a joint claim is burdened with some incidental encumbrances which may hinder its prosecution to judgment, yet, in the final analysis, a joint promise makes each promisor liable for the whole debt, and the liability of the individual is not secondary as in the case of partners. A joint and several debt and also a joint debt are unlike a pure partnership debt, because the latter creates a primary charge against the partnership fund and a secondary charge against the separate funds of the persons who compose the partnership, and it necessarily follows that a pure partnership creditor is not in the same class as a creditor who holds a claim against an individual who happens to be a member of the partnership. Neither the Silvertown Lumber Company notes nor the Stayton State Bank notes are pure partnership debts, but both groups of notes are unsecured claims against the persons whose names appear as makers, and as such unsecured claims they are entitled to receive dividends from the estate of each promisor: *Board of County Commrs. v. Hurley*, 169 Fed. 92, 97 (94 C. C. A. 362).

24. Both the Silvertown Lumber Company and the Stayton State Bank were creditors of McLaughlin on July 16, 1914, when the action was commenced against

Wassom and McLaughlin, and consequently the enforcement of the judgment obtained by the bank will work a preference if the two creditors belong to the same class. The meaning of the word "class" as used by the Bankruptcy Act is explained in *Swarts v. Fourth Nat. Bank*, 8 Am. Bank. R. 673, 680 (117 Fed. 1, 54 C. C. A. 387), where the court says:

"While it is true that the Bankrupt Act does not define the word 'class,' nor in terms state what creditors are in the same class, it creates some classes, and specifies others, and it seems to us that the meaning of the word 'class' in the act should, if possible, be derived from the statute itself. Section 64, after directing the payment of certain expenses of administration, creates three classes of creditors: Parties to whom taxes are owing; employees holding claims for certain wages; and those who, by the laws of the States or of the United States, are entitled to priority. Sections 56b, 57e and 57h provide for the treatment and disposition of claims secured by property, and of claims which have priority. The creditors who hold these various claims, and the general creditors of the estate, constitute the classes of creditors of which the Bankrupt Act treats. Now, if any one of these various classes is taken by itself and examined, it will be seen that each one of the creditors in the same class always receives the same percentage upon his claim, out of the estate of the bankrupt that every other creditor of his class receives. Where the estate is insufficient to pay the claims of different classes in full, the classes receive, out of the bankrupt estate, different percentages of their claims, but creditors of the same class receive the same percentage. The test of classification is the percentage paid upon the claims out of the estate of the bankrupt. * * Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. Their relations to third parties, their right to collect

of others, the personal security they may have through indorsements or guaranties, receive no consideration, no thought. It is the relation of their claims to the estate of the bankrupt, the percentages their claims are entitled to draw out of the estate of the bankrupt, and these alone, that dictate the relations of the creditors to the estate, and fix their classification and their preferences": 2 Remington, Bankruptcy (2 ed.), § 1387; 1 Loveland, Bankruptcy, § 513.

Both groups of notes belong to the fourth class of creditors of McLaughlin, and therefore the Silverton Lumber Company notes would be entitled to the same percentage of dividends as the Stayton State Bank notes could claim from the individual estate of McLaughlin; and the conclusion follows that both groups of notes are held by creditors of the same class. It was error to allow a nonsuit.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and
MR. JUSTICE McBRIDE concur.

Argued October 17, reversed December 27, 1916.

STATE v. BRANSON.

(161 Pac. 689.)

Criminal Law—Evidence—Admissibility.

1. In a murder case, where it appeared that the footprints of a man and woman and a woman's hair-rat were found in the vicinity of the body, evidence that a codefendant, wife of deceased, had been seen by several witnesses near the scene of the crime shortly after a shot had been heard, that deceased was jealous of a supposed intimacy between defendant and his wife to defendant's knowledge, and of subsequent comparison of the hair-rat with those used by the wife, was admissible as a narration of the circumstances so closely con-

nected with the issue as to be a part of the *res gestas* and tending to show joint action, and was not evidence of declaration and acts of a co-conspirator before proof of conspiracy forbidden by Section 727, subdivision 6, L. O. L.

Homicide—Evidence—Admissibility.

2. Testimony of witness as to a comparison of a hair-rat found in the vicinity of the body with those found by them at the house of a codefendant, wife of deceased, was properly permitted when the witnesses testified that the "rats" submitted in court were not the ones compared by them at the home of the codefendant.

Homicide—Evidence—Admissibility.

3. Evidence that defendant had been seen talking to a codefendant, wife of deceased, on numerous occasions in front of her home, when her husband was absent, and that she had been seen standing on the bank of the river 100 yards from the bridge on which defendant was standing, was admissible, as going directly to the conduct of the defendant.

Homicide—Evidence—Admissibility.

4. Evidence of comparison made between woman's tracks found at the scene of the homicide with shoes worn by codefendant, wife of deceased, was properly admitted, where the shoes compared were not in court.

Criminal Law—Trial—Statements of Counsel.

5. The action of the court in permitting the district attorney, in his opening statement to the jury, to announce his intention to prove that defendant and codefendant, wife of deceased, had been seen together under peculiar circumstances, although with the purpose of raising a suspicion of adultery and thereby establishing a motive for the killing, was not error.

[As to limitations upon the right of argument of counsel in criminal trials, see note in 46 Am. St. Rep. 23.]

Witnesses—Cross-examination—Impeachment.

6. Defendant's witness was properly questioned on cross-examination as to a purported conversation in which the witness was supposed to have advised the codefendant, wife of deceased, that she and defendant would be arrested, separated, and each misled into thinking that the other had confessed and advising her and requesting another to remain silent as to such advice.

Witnesses—Impeachment—Rebuttal.

7. Where defendant's witness on cross-examination denied statements advising codefendant, wife of deceased, that she and defendant would be arrested, separated and misled into believing each had confessed, evidence in rebuttal that such statements were made was admissible.

Criminal Law—Appeal and Error—Review—Instructions.

8. The refusal of a requested instruction fully covered by the given instructions was not error.

Criminal Law—Trial—Instructions.

9. Where there was no evidence of a conspiracy or common design between defendant and codefendant to murder, a qualification of an instruction on alibi that, if defendants were acting together with a common design to bring about the death of deceased, it would not be necessary for both of them to have been actually present at the crime but each is bound by the act of the other in furtherance of the common design, was error.

Criminal Law—Review—Reversal.

10. Although Article VII, Section 3, of the Constitution, as amended in 1911, provides that, if the Supreme Court shall be of opinion that the judgment of the court appealed from was such as should have been rendered in the case, such judgment should be affirmed, notwithstanding any error committed during the trial in a murder case, where the court erroneously instructed the jury as to conspiracy between codefendants, the appellate court may not determine what influence the elimination of the question of conspiracy would have upon the jury's determination, and judgment must be reversed.

From Yamhill: **HARRY H. BELT**, Judge.

Department 1. Statement by **MR. JUSTICE BENSON**.

William Branson and Anna Booth were jointly indicted for murder in the second degree charged to have been committed in the killing of William Booth on October 8, 1915. Separate trials having been demanded by the defendants, the defendant Branson was placed upon trial, and from a verdict of guilty as charged and a judgment thereon he prosecutes this appeal.

REVERSED.

For appellant there was a brief over the name of *Messrs. McCain, Vinton & Burdett*, with oral arguments by *Mr. W. T. Vinton* and *Mr. James E. Burdett*.

For the State there was a brief with oral arguments by *Mr. George M. Brown*, Attorney General, and *Mr. Roswell L. Conner*, District Attorney.

MR. JUSTICE BENSON delivered the opinion of the court.

The first eight assignments of error are so closely related as to be susceptible of discussion together.

To clearly comprehend defendant's contentions, it is necessary to make a brief statement of the evidence submitted by the prosecution. William Booth, the victim of the alleged homicide, was the husband of the defendant Anna Booth; their home being in the village of Willamina, upon the east bank of the Willamina River. The defendant Branson, a young man 23 years of age, resided with his parents in the same village. On the afternoon of October 8, 1915, at about 1:30 P. M., some witnesses heard a shot fired near the river at a point on the premises of one Yates, about a mile and a half northwest of Willamina, and near the county road running past the Yates place. At about 3:30 P. M. a young man named Carter discovered the dead body of William Booth lying on the bank of the river with one hand and perhaps other portions of the corpse in the water. He immediately hastened to the village and notified the authorities. An inquest was held, and in the vicinity of the body the footprints of a man and a woman were found in the loose soil. A "woman's hair-rat" was also found there.

1. Upon the trial evidence was admitted, over the objection of the defendant, tending to prove that William Booth was jealous of the supposed intimacy between his wife and the defendant; that this jealousy was well known to Branson; that near 1 o'clock on the afternoon of the homicide witnesses saw Anna Booth walking along the county road in the direction of the spot where the body of William Booth was subsequently found; that a few minutes later the defendant was seen going in the same direction; that they each passed Axel Nelson, who was sitting in his wagon on the highway talking to a woman who stood in her doorway; and that Nelson, within a few minutes after defendant passed, drove on in the same direction to

his home some four miles west of Willamina, but did not see either defendant again. Mrs. Yates was permitted, over the objection of defendant, to testify that she heard a shot near the river bank at the foot of her garden; that she went down in that direction to see about it, and when near the gate opening into the highway she saw Anna Booth in the road at a point near where the body of Booth was afterward discovered. Clay Rowell was permitted to testify that on the afternoon of the homicide he was fixing a fence along the road a short distance west of the place where the killing occurred; that about 1:30 P. M. he heard a shot fired, and that within 15 or 20 minutes thereafter Anna Booth passed him going west. Other witnesses testified to the circumstance of visiting the home of Anna Booth on the morning after the homicide and making a comparison of the "hair-rat" found at the scene of the tragedy with others which were at the time in the possession and use of the defendant Anna Booth. Defendant urges that all of the evidence was erroneously admitted, for the reason that it violates the statutory rule that evidence of the declaration or act of a conspirator cannot be given against a co-conspirator until after proof of a conspiracy: Subdivision 6, Section 727, L. O. L. It will be noticed, however, that the testimony referred to does not involve any declarations of Anna Booth, and merely a narration of circumstances so closely connected with the vital issue upon trial as to be a part of the *res gestae*.

In *Commonwealth v. Kaiser*, 184 Pa. 493, 499 (39 Atl. 299, 300), the court says:

"The commonwealth claimed a conspiracy, but the court held the evidence insufficient to sustain that contention, but admitted evidence of the presence and identification of accomplices. The question of accomplices and what they did is a different one from con-

spiracy, but the two issues run closely together in the mode of proof and the evidence to establish them."

Again, in *Fitzpatrick v. United States*, 178 U. S. 304 (44 L. Ed. 1078, 20 Sup. Ct. Rep. 944), we note the following language:

"As there was some evidence tending to show a joint action on the part of the three defendants, any fact having a tendency to connect them with the murder was competent upon the trial of Fitzpatrick. The true distinction is between statements made after the fact, which are competent only against the party making the statement, and facts connecting either party with the crime which are competent as a part of the whole transaction. In the trial of either party it is proper to lay before the jury the entire affair, including the acts and conduct of all the defendants from the time the homicide was first contemplated to the time the transaction was closed. It may have a bearing only against the party doing the act, or it may have a remoter bearing upon the other defendants; but, such as it is, it is competent to be laid before the jury."

In *Musser v. State*, 157 Ind. 423 (61 N. E. 1), it is said:

"The rule urged by appellant in regard to the declarations and acts of a conspirator made after the object of the conspiracy has been accomplished has no application to such evidence. The evidence was concerning a physical fact, and tended to prove the guilt of Marshall, and when considered in connection with all the other evidence in the case also tended to prove the guilt of appellant. There was no doubt that a homicide had been committed. The question of the guilt or innocence of appellant was to be determined by the jury. There was evidence tending to show that three persons were present at the commission of the crime, and any fact tending to connect any one of them with the crime was competent evidence against

the others. That evidence of this character is admissible is well settled."

It would seem that the authorities make a marked distinction between evidence tending to show a conspiracy and that which tends simply to disclose joint action. Upon the latter theory the evidence was properly admitted.

2. It is also contended that the testimony in regard to the comparison of the "rats" was incompetent, because the witnesses did not qualify as experts, and, if not experts, the jury was the proper authority to make the inspection. In reference to this point, it may be said that the witnesses for the state testified that the "rats" submitted in court were not the ones compared by them at the home of Anna Booth, and under such circumstances it was proper for the court to permit them to testify as to their former comparison.

3, 4. It is next urged by defendant that the court erred in permitting witnesses to testify, over his objection, to having seen him on numerous occasions talking to Anna Booth in front of her home when her husband was absent, and upon one occasion seeing her standing upon the bank of the river at a point about 100 yards above the bridge and the defendant standing upon the bridge smoking a cigarette. It is not for us to discuss the weight, effect or value of this evidence, but since it goes, not to the acts of the codefendant, but directly to the conduct of this defendant, there was no error in admitting it. What has been said in reference to the "rats" may well be applied to the evidence in regard to the woman's tracks found at the scene of the homicide and measurements and comparisons thereof with shoes worn by Anna Booth. The evidence was properly admitted.

5. Complaint is also made that the court committed error in permitting the district attorney, in his opening statement to the jury, to announce his intention to prove that the two defendants were seen together under peculiar circumstances, since its purpose was to raise a suspicion of adultery and thereby establish a motive for the killing. As we have already suggested that the evidence referred to was properly admitted, no error can be based thereon.

6, 7. The next assignment pertains to the questions and answers whereby it was sought to impeach the testimony of Isabel Branson. Briefly stated, the cross-examination of this witness was directed to a purported conversation alleged to have been held between the witness and Anna Booth on the day before the preliminary examination of both defendants before a committing magistrate in which the witness was supposed to have advised Mrs. Booth that she and the defendant Branson would both be arrested, put into separate cells, and each misled into believing that the other had confessed, and advising her to remain silent, and also requesting Maude Fuqua to keep quiet as to such advice. The witness denied making such statements, and in rebuttal the witness Maude Fuqua testified to their having been made. In the case of *State v. Olds*, 18 Or. 440 (22 Pac. 940), this court says:

“The state had the right, on the cross-examination, to ask this witness anything that would show his interest in the result of the trial, and anything he did in aid of the defendant about the trial, for the purpose of enabling the jury to properly weigh his evidence, and to intelligently pass upon his credibility.”

The same doctrine is quite clearly stated in *State v. Finch*, 54 Or. 482 (103 Pac. 505), and we conclude that there was no error in admitting the evidence.

8. We now come to the consideration of the charge to the jury. Among others, the defendant requested the court to instruct the jury as follows:

"If you should infer from proven circumstances alone that adulterous relations existed between the defendant William Branson and Anna Booth, you cannot base upon such inference the further inference of the slaying of William Booth by the defendant William Branson. In other words, inferences can only arise from facts legally proved and not from other inferences."

The court refused the request, and this is assigned as error. All that needs to be said in relation to this assignment is that the substance of the requested instruction is fully covered by the charge which was given, and consequently it was not error to decline a repetition thereof.

9. We shall next consider the court's instruction upon the subject of an alibi. The defendant requested that the jury be instructed as follows:

"You are instructed that one of the defenses interposed by the defendant in this case is what is known as an alibi; that is, that the defendant was at another place at the time of the commission of the crime. The court instructs you that such defense is as proper and legitimate if proven, as any other, and all evidence bearing upon that point should be carefully considered by you. If, in view of all the evidence, you have a reasonable doubt as to whether the defendant was in some other place when the crime was committed, then you should give the defendant the benefit of the doubt. Regarding the defense of an alibi, you are instructed that the defendant is not required to prove that defense beyond a reasonable doubt, to entitle him to an acquittal, but is sufficient if the evidence raises a reasonable doubt of his presence at the time and place of the commission of the crime charged."

The court gave the substance thereof, but with vital modifications, in the following form:

“You are instructed that one of the defenses interposed by the defendant in this case is what is known as an alibi; that is, that the defendant Branson was at another place at the time of the commission of the alleged crime. This court instructs you that such defense is as proper and legitimate, if proven, as any other and all evidence bearing upon that point should be carefully considered by you. If, in view of all the evidence, you have a reasonable doubt as to whether the defendant was at some other place when the crime was committed, then you should give the defendant the benefit of that doubt, and find the defendant not guilty, subject, however, to the other instructions which I will give you relative to the law of this case. Regarding the defense of an alibi, you are instructed that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to acquittal, but it is sufficient if the evidence raises a reasonable doubt of his presence at the time and place of the commission of the crime charged. In this case, however, you should bear in mind the instruction which I have heretofore given you that if the defendant and Anna Booth were acting together with the common design to bring about the death of William Booth, in the manner and as charged in the indictment, it would not be necessary for both of them to have been actually present at the place and at the time of the alleged crime, for, as I have stated to you before, each codefendant is bound by the act of the other in the furtherance and execution of the common design.”

This is undoubtedly a correct and excellent abstract exposition of law, and, if the record disclosed any evidence of a common design or conspiracy to take the life of William Booth, there would be no doubt whatever of the correctness of the charge. We have searched the record in vain for a scintilla of evidence tending to disclose any conspiracy or common design

to perpetrate a homicide. This court, in a long line of decisions beginning with *Morris v. Perkins*, 6 Or. 350, has held that it is error to submit to a jury questions of fact upon which there is no evidence. That the concluding portions of the instruction quoted is error cannot, therefore, be doubted, and to determine that it was prejudicial to the defendant's interest is manifest from the mere reading.

10. It has been urged that, even though the instruction is error, the judgment should be affirmed under the authority of Section 3 of Article VII of the state Constitution as amended in 1911 (Laws 1911, p. 7), wherein it is provided that:

“If the Supreme Court shall be of opinion, after consideration of * * the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial.”

To answer this suggestion fully would involve such a discussion of the value and effect of the evidence in the case as would, under the circumstances, be improper. We thus confine ourselves to saying that an elimination of the question of conspiracy might well have a direct influence upon a jury's determination of the decree of crime involved in the acts as a crime, and such determination must always remain a function of the jury rather than of the court.

It follows that the judgment must be reversed and the cause remanded for a new trial. REVERSED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE HARRIS and MR. JUSTICE MCBRIDE concur.

Argued October 11, affirmed December 27, 1916.

PACIFIC COMPANY v. CRONAN.

(161 Pac. 692.)

Pleading—Amendment During Trial—Variance.

1. Where defendant, by evident clerical error, failed to deny material allegations, the rule against amendment changing the cause of action does not prevent amendment to enter the denial, especially where both parties went to trial on the theory that such matters were at issue, and plaintiff's only objections were too general to indicate the defect.

Pleading—Amendment During Trial—Variance.

2. The allowance or refusal of an amendment is largely a matter of discretion of the court and depends on circumstances of the particular case.

Pleading—Amendment During Trial.

3. Courts should be liberal in granting amendments pending trial, when it is evident that such course will further justice, particularly in the case of the defendant.

[As to how far an amendment, varying or altering cause of action, is allowable, see notes in 34 Am. Dec. 158; 51 Am. St. Rep. 414.]

From MORROW: GILBERT W. PHELPS, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is an action by the Pacific Company, a corporation, against J. E. Cronan to recover commission for services in procuring a purchaser for bank stock. The complaint, omitting formal matters, is substantially as follows:

"I. That the Charles E. Walters Company at all times hereinafter mentioned was, is, and has been a corporation organized and existing under the laws of the State of Iowa, and having complied with all the laws of the State of Oregon with reference to nonresident corporation, and at all times was authorized to do business in the State of Oregon.

"II. That on or about the twenty-fourth day of October, 1913, in the City of Portland, Multnomah County, Oregon, the defendant herein orally agreed

with the Charles E. Walters Company, a corporation, that if the Charles E. Walters Company would procure a purchaser ready, able and willing to purchase from J. E. Cronan 202 shares of stock in the Bank of Ione, located at Ione, Oregon, at the book value of said shares of stock, which was estimated to be \$55 per share, that defendant would pay said the Charles E. Walters Company 5 per cent of the total price for which said shares of stock were sold or at which the said the Charles E. Walters Company procured a purchaser.

"III. That terms as to the time of payment by the purchaser of said shares of stock were to be made by said J. E. Cronan at the time a purchaser was procured.

"IV. That thereafter on, to wit, about the twenty-sixth day of October, 1913, the Charles E. Walters Company did procure a purchaser, to wit, one L. M. Meeker, who was ready, able and willing to purchase said bank stock upon terms fixed by the defendant, and thereupon the Charles E. Walters Company notified the defendant and arranged a meeting between L. M. Meeker and said defendant, which meeting was held on the twenty-sixth day of October, 1913, and terms of payment were arranged so that L. M. Meeker agreed to pay unto said J. E. Cronan for said 202 shares of stock the book value thereof plus 5 per cent upon terms satisfactory to said J. E. Cronan.

"V. That said L. M. Meeker as a purchaser was procured solely through the efforts of the said the Charles E. Walters Company and the meeting between said L. M. Meeker and J. E. Cronan was procured solely by the efforts of said the Charles E. Walters Company.

"VI. That the book value of said shares of stock at all times herein mentioned was at least \$55 per share.

"VII. That 5 per cent of the agreed sale price of said 202 shares of stock fixed between said J. E. Cronan and L. M. Meeker is the sum of \$555.50. * *

"IX. That prior to the commencement of this action, to wit, on the twenty-third day of April, 1914,

the Charles E. Walters Company regularly sold and assigned unto plaintiff all of its right, title and interest in the matters covered in this complaint, and the claim of said the Charles E. Walters Company against the defendant."

The original answer denied all of the above paragraphs, except II and VI. Upon the trial plaintiff introduced testimony tending to support the whole case made by the pleadings, including the allegations made in paragraphs II and VI, and the defendant also went into the whole case and offered testimony tending to show that the original offer to sell was coupled with a condition that the purchase was to include certain real estate owned by defendant and not otherwise. He also denied, in substance, that he and Meeker ever came to an agreement as to terms of payment. The plaintiff objected to testimony offered tending to show that the original offer to sell was on condition that the land of defendant should go with the purchase of the stock. There were several objections of this character made, but they were either general and to the effect that the evidence offered was not within the issues pleaded or merely general without stating the grounds. At no time while the testimony was being offered did counsel for the plaintiff specifically point out or call to the attention of the court the fact that paragraphs II and VI had not been denied. The objections being overruled, counsel for the defendant moved for a directed verdict, and for the first time specifically called attention to the fact that paragraphs II and VI of the complaint had not been denied. Thereupon counsel for defendant moved the court for leave to amend by denying these paragraphs, and, the amendment being permitted, the motion for judgment on the verdict was overruled, to all of which counsel for plaintiff ex-

cepted. The matter then went to the jury and resulted in a verdict and judgment for defendant, from which plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Joel D. Pomerene* and *Mr. Coy Burnett*, with an oral argument by *Mr. Pomerene*.

For respondent there was a brief over the names of *Mr. Guy C. H. Corliss* and *Mr. Sam E. Van Vactor*, with an oral argument by *Mr. Corliss*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. The court did not err in submitting the case to the jury, as the defendant's evidence tended in some degree to show that Meeker and the defendant never came to a final, definite agreement as to the terms of payment. While a defendant cannot amend upon the trial by introducing an entirely new cause of defense, we do not think the rule goes so far as to prohibit the amendment of what, in view of the facts in the case, was an obvious clerical error or oversight. At the time the deposition of the first witness for plaintiff was taken, which was several days before the trial, it must have been apparent to counsel for plaintiff that the defense was proceeding upon the theory that the matter alleged in paragraph II was in issue and that a negation of it was the principal defense relied upon. The plaintiff examined the witness Meeker as to the first dealings between himself and defendant where the offer was made by defendant to sell the stock with the land included, and further as to a communication from the Walters corporation informing him that they had the bank for sale without the land. Upon

cross-examination the plaintiff's counsel objected that these matters were not within the issues pleaded, but did not call specific attention to this particular defect as to denials. The deposition of this witness was offered on the trial, and it does not appear that the objections raised at the time the deposition was taken were saved in the Circuit Court. The plaintiff having gone into the question of the contract fully upon this subject and treated the matter of the substance of the contract as if it were actually in issue was in no position to object to testimony that it was not, in fact, in issue as a matter of technical pleading. Plaintiff evidently was not misled in any respect by the omission as its counsel presented its side of the case precisely as though the allegation were denied, and having done so should not be allowed to change its theory when defendant merely met the testimony introduced by it. The objections made to defendant's testimony, while perhaps technically sufficient, were not calculated to inform the court or opposing counsel of the particular defect in the pleading upon which plaintiff relied. In fact, the real purpose of the objections was shrewdly masked behind generalities, and it was not until counsel by a motion to direct a verdict disclosed the fact that, like Ah Sin of poetic memory, he had a surreptitious "right bower" in reserve in the shape of an omitted denial that the court and counsel discovered the nature of the objections to the testimony.

2. The allowance or refusal of an amendment is largely a matter of discretion of the court, and must depend upon the peculiar circumstances of each particular case; the general rule being that the ruling of the trial court upon the question will not be disturbed unless there is an abuse of discretion or an absolute disregard of some affirmative statute. It is also uni-

versally held that the courts should be liberal in granting such amendments when it is evident that such permission will be in furtherance of justice, and this is particularly the case in respect to defendants: Bliss, Code Pleading (3 ed.), § 430; 1 Cyc. 518; 31 Cyc. 422. The reason for this discrimination in favor of a defendant is that, while a plaintiff, whose evidence is shut out by reason of a lack of a material allegation, may take a nonsuit and begin again, the defendant has no such remedy, but must lose irretrievably.

3. We are of the opinion that the plaintiff by proceeding in the introduction of evidence upon the theory that the nature of the contract was in issue was estopped to assert that such fact had not been technically put in issue by the pleadings, and that the action of the court in permitting the defendant to meet the evidence so introduced and to amend his answer to conform to the facts proved was not an abuse of discretion, but, on the contrary, was in furtherance of justice, the ultimate aim of which is to allow every party a fair trial upon the merits. Plaintiff having opened the door for the reception of such evidence cannot complain because the defendant and the court treated his example as good law: *Charlton v. Scoville*, 68 Hun, 348, 22 N. Y. Supp. 883.

The judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and
MR. JUSTICE BENSON CONCUR.

Argued October 17, reversed December 27, 1916.

STATE v. BOOTH.

(161 Pac. 700.)

Criminal Law—Evidence—Declarations of Conspirator—Statute.

1. Under Section 727, subdivision 6, L. O. L., providing that after proof of a conspiracy the declarations or acts of a conspirator against his co-conspirator relating to the conspiracy may be admitted, declarations of an alleged co-conspirator, jointly indicted and separately tried, were inadmissible, where no evidence of a conspiracy had been offered.

Criminal Law—Instructions—Conspiracy—Evidence.

2. In a trial for homicide under a joint indictment with a separate trial, an instruction upon conspiracy to commit crime, though proper as abstract statement of law, was erroneous, where there was no evidence of a conspiracy or common design on the part of the defendants to take the life of the deceased.

Homicide—Appeal—Harmless Error—Instruction.

3. Such instruction was prejudicial to defendant.

From Yamhill: HARRY H. BELT, Judge.

The defendant, Anna Booth, was indicted, tried and convicted of murder in the second degree, and from the judgment and sentence imposed she appeals. Reversed and cause remanded for a new trial.

REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. McCain, Vinton & Burdett*, with an oral argument by *Mr. W. T. Vinton* and *Mr. James E. Burdett*.

For the State there was a brief with oral arguments by *Mr. George M. Brown*, Attorney General, and *Mr. Roswell L. Conner*, District Attorney.

Department 1. MR. JUSTICE BENSON delivered the opinion of the court.

The facts of this case are sufficiently set out in the opinion of *State v. Branson*, ante, p. 377. The defend-

ants were jointly indicted, and upon separate trials were both convicted of murder in the second degree. The testimony in both cases was substantially the same

1. There are several assignments of error, but we deem it necessary to consider only those which have to do with the question of conspiracy. Upon the trial of this defendant the witness Milton Booth was permitted to testify, over the objection of defendant, to a conversation between himself and the codefendant, William Branson, held in July preceding the homicide, in which Branson said, "Bill Booth is very jealous, ain't he?" to which the witness replied: "Yes; and not only that, Billy, but he always was." Whereupon Branson continued, "If Bill Booth wants to shoot, he can shoot and be damned," and the witness answered, "Tut, tut, such talk as that," and Branson then said, "Well, I mean it; if Bill Booth wants to waylay, he can waylay; I can waylay, too." The witness replied, "Why, Billy, to talk that way," and Branson repeated, "Well, I mean it." At the close of the state's case, defendant moved to strike out this testimony and withdraw it from the consideration of the jury upon the ground that no evidence of a conspiracy had been offered and that this conversation was inadmissible under the provisions of Section 727, subdivision 6, L. O. L., which reads as follows:

"In conformity with the preceding provisions, evidence may be given on the trial, of the following facts:
* * 6. After proof of a conspiracy, the declaration or act of a conspirator against his co-conspirator, and relating to the conspiracy."

This evidence was clearly inadmissible as against this defendant, and the motion to strike should have been allowed.

2, 3. The court also gave the jury several instructions upon the subject of conspiracy to commit crime, notably the following:

“In this case, however, you should bear in mind the instructions which I have heretofore given you that, if the defendant and William Branson were acting together with the common design to bring about the death of William Booth in the manner and as charged in the indictment, it would not be necessary for both of them to be actually present at the place and time of the alleged crime; for, as I have stated to you before, each codefendant is bound by the act of the other in the furtherance and execution of a common design. Now then, you should determine first, Were they acting together in such common design? If they were not acting together in such design, and Mrs. Booth was not present at the time and place of the alleged killing, then it would necessarily follow that it would be impossible for her to have committed the crime. But if they were acting together in a common design, then it does not make any difference whether she was present or not, if she aided, counseled, and abetted Branson in the commission of the crime.”

We have no fault to find with the abstract statement of the law as expressed in this charge, and in a proper case it should be given; but we have made a careful and thorough analysis of all the testimony herein, and have been unable to find a scintilla of evidence tending in any manner to show a conspiracy or common design on the part of the defendants to take the life of William Booth. As was said in *State v. Branson*, ante, p. 377, the companion case, it is well settled that it is error to instruct a jury upon abstract questions in regard to which there is no evidence in the record. It needs no argument to show that such instruction was prejudicial to the defendant's interests.

The judgment is reversed and the cause remanded for a new trial. **REVERSED AND REMANDED.**

MR. CHIEF JUSTICE MOORE, MR. JUSTICE HARRIS and MR. JUSTICE McBRIDE concur.

Submitted on brief November 2, reversed December 27, 1916.

GOSNEY v. McALISTER.

(161 Pac. 701.)

Arbitration and Award—Action on Award—Complaint—Sufficiency.

1. A complaint, in an action upon an award of a board of arbitration fixing the amount due plaintiff on the rescission of his release from defendants, husband and wife, disclosing affirmatively that the defendant wife did not sign the lease and that it was the act of the husband alone, and that the agreement to arbitrate was the act of the husband, acquiesced in by the wife, and that an award was made against the husband but not against the wife, stated no cause of action against the defendant wife.

[As to revocation of agreement to arbitrate, see note in 138 Am. St. Rep. 640.]

From Crook: T. E. J. DUFFY, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is an action by H. A. Gosney against Andrew McAlister and Jane McAlister, his wife, upon an award of a board of arbitration.

The complaint alleges that the defendants are the owners of certain lands in Crook County; that on January 25, 1915, the defendants leased such lands to plaintiff for a period of three years from and after March 1, 1915; that the lease was in writing, signed by Andrew McAlister, and it was "ratified and confirmed by — McAlister verbally"; that thereafter and pursuant to the lease plaintiff took possession of the premises with the consent of both defendants; that

on March 27, 1915, all of the parties were desirous of rescinding the contract and then entered into a written agreement to settle and determine the terms of such rescission through a board of arbitration; and that such agreement was signed by Andrew McAlister and "acquiesced in by defendant — McAlister." Then follow allegations of the organization of and a hearing by them. Their report and award is set out in full as follows:

"We, the undersigned, arbitrators duly and regularly chosen to hear, determine and settle the differences that have arisen between Andrew McAlister and H. A. Gosney over the lease and rescinding of said lease existing between said parties for the McAlister ranch near Laidlaw, Oregon, and to determine and settle the amount of money, if any, either of said parties shall pay to the other, after giving all credits and making all deductions, after hearing the testimony of the parties and their witnesses and after viewing the premises, and after due consideration find: That H. A. Gosney is entitled to be paid the sum of \$151.10, by Andrew McAlister, and the expense of the board shall be paid as follows: Andrew McAlister to pay the man selected by him and the expense of the third man to be divided equally by the parties. We further find that the said sum of money shall be paid within 90 days from the date hereof.

"Dated this 31st day of March, 1915."

It is further alleged that the payments thereunder are refused by defendants, and there follows a prayer for judgment.

Andrew McAlister defaulted, and judgment was entered against him, but Jane McAlister filed a demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action as to her. The demurrer being overruled, she declined to plead

further, and from the consequent judgment she appeals.

Submitted on brief without argument under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

REVERSED AND REMANDED.

For appellant there was a brief submitted over the name of *Mr. W. B. Daggett*.

For respondent there was a brief prepared and filed by *Mr. Harvey H. De Armond*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. It will be observed that the complaint discloses affirmatively that the defendant Jane McAlister did not sign the lease, and that no one signed it for her, so that no question of ratifying the act of an agent is involved, and as a logical sequence it appears that the written instrument was simply the act of Andrew McAlister leasing his own interest in the land, whatever that may have been, for a term of three years. It further appears that the written agreement to arbitrate was likewise the act of Andrew McAlister acquiesced in by Jane. It is also noted that the report of the board of arbitrators made no award whatever against Jane McAlister, whose name does not appear therein, but determined that Andrew should pay to plaintiff the sum of \$151.10, and, since the action is based exclusively upon the award, it is clear that no cause of action is stated as against the defendant Jane McAlister, and the court erred in failing to sustain the demurrer.

The judgment is therefore reversed, and the cause remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED.

Motion to dismiss appeal allowed December 27, 1916.

STATE v. KEENEY.

(161 Pac. 701.)

Criminal Law—Appeal—Record—Transmission.

1. The time fixed by law for the filing of a transcript on appeal cannot be extended by stipulation of the parties without an order of court.

Criminal Law—Appeal—Record—Transmission.

2. After the expiration of the statutory time for filing copies of the transcript in a criminal case, neither the trial court nor appellate court can extend the time by order *nunc pro tunc*; the right of appeal being purely statutory.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

The defendant, Mordie Keeney, was tried and convicted of the crime of arson, and from the sentence imposed appeals. The ground on which the motion of the State to dismiss the appeal is set forth in the opinion of the court.

APPEAL DISMISSED.

Mr. Walter H. Evans, District Attorney, for the motion.

Messrs. Littlefield & Maguire, contra.

In Banc. MR. JUSTICE HARRIS delivered the opinion of the court.

1, 2. On October 3, 1916, we dismissed an appeal which the defendant attempted to prosecute; and the opinion is reported in *State v. Keeney*, 81 Or. 478 (159 Pac. 1165), where the facts are fully stated. Afterward, on October 17th, defendant Keeney filed another transcript predicated on the first notice of appeal which had been filed on December 13, 1915, and the State has again moved for a dismissal. When the first notice of appeal was filed the Circuit Court granted 90 days for

preparing and filing the transcript, and on March 13th the court made a second order extending the time to and including March 21, 1916. The defendant claims that "prior to the said twenty-first day of March, 1916, an oral stipulation was entered into between" counsel "that appellant should and would have 10 days' additional time within which to file his transcript and tender a bill of exceptions." Even though it be assumed that the time for filing the transcript could be extended by the stipulation of the parties without an order of the court, nevertheless the defendant is in no position to claim any benefit from the stipulation, for the reason that the transcript was not filed until more than 10 days after March 21. The proposed bill of exceptions was not even tendered until April 5, 1916. However, this court has held in *Davidson v. Columbia Timber Co.*, 49 Or. 577 (91 Pac. 441), cited with approval in *State v. Douglas*, 56 Or. 20 (107 Pac. 957), that the parties cannot by a stipulation effect an extension without an order of the court. The delay was not the fault of the clerk, and as said in *State v. Morgan*, 65 Or. 314, 316 (132 Pac. 957, 958):

"After the expiration of the time allowed by the statute for filing copies of the documents required, neither the Circuit Court nor this court has authority to make an order *nunc pro tunc* extending the time, or to change the statute by granting a different right of appeal than as provided for by the statute."

There is no alternative except to dismiss the appeal; and it is so ordered.

APPEAL DISMISSED.

Argued December 18, reversed December 27, 1916.

CLARK v. COOS COUNTY.

(161 Pac. 702.)

Constitutional Law—Counties—Right to Sue—Injuries to Employees—Self-executing Provisions.

1. Since an injured workman's action for damages under Employers' Liability Act (Laws 1911, p. 16) is a tort action, and a county, under Section 358, L. O. L., can be sued on its contracts and not otherwise, he cannot recover, in spite of Article I, Section 10, of the Constitution, providing that every man shall have a remedy by due course of law for any injury; such provision, as regards counties, not being self-executing.

[As to self-executing provisions of Constitution, see note in Ann. Cas. 1914C, 1116.]

From Coos: JOHN S. COKE, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is an action in which the plaintiff, Thomas J. Clark, essays to charge Coos County under Chapter 3 of the General Laws of Oregon for 1911, generally known as the Employers' Liability Act. He claims that, while he was at work as an employee of the defendant repairing a county road in that county under the supervision of the road supervisor, he was injured by a stone rolling down a hillside and striking him on the shoulder. The essence of his charge is that the defendant county neglected to use every device, care or precaution that it was practicable to use for the protection of the plaintiff; that a safe device or precaution consisted in the employment of a person to watch for any rock, earth or debris that might fall or roll down the side of the mountain from above the place where the plaintiff was working, and to give him notice of such falling.

The answer denied all responsibility on the part of the defendant and traversed every averment imputing

negligence to it. Affirmatively the defendant set up matter tending to show that the plaintiff was the employee of an independent contractor engaged in the prosecution of the work mentioned.

All the new matter of the answer was traversed by the reply. At the close of plaintiff's case, defendant moved for a judgment of nonsuit on various grounds, which was denied. When all the testimony was in, the defendant moved for an order directing a verdict in its favor for the reason, among others, that no evidence had been adduced in the trial sufficient to constitute a cause of action against the defendant. This motion was denied, a verdict and judgment resulted in favor of the plaintiff, and the defendant appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Lawrence A. Liljeqvist*.

For respondent there was a brief over the names of *Mr. Austin S. Hammond*, *Mr. E. D. Sperry* and *Mr. A. H. Derbyshire*, with an oral argument by *Mr. Hammond*.

MR. JUSTICE BURNETT delivered the opinion of the court.

The case at hand is identical in principle, and must be governed by the decision in *Rapp v. Multnomah County*, 77 Or. 607 (152 Pac. 243), which ruled that, where the plaintiff sues under the Employers' Liability Act for personal injuries sustained while an employee of the county, his action is one of tort resting on negligence and will not be heard, as the county can be sued only under Section 358, L. O. L., which permits suits against it on its contracts only; and that, where the legislature failed to include counties in the opera-

tion of the Employers' Liability Act, the courts will not apply the statute to actions against them.

At the argument the plaintiff counted strongly on the language of Section 10 of Article I of the Constitution of the state that:

"Every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

Against whom the man shall have a remedy is not stated. Neither is any process detailed whereby it may be enforced. Until the legislative department of the government shall provide that the state or its counties may be sued, in an action of this sort, this constitutional provision as to state governmental agencies must be treated as not self-executing. Manifestly this has been the legislative construction of the clause, else we would not have such enactments as Section 358, L. O. L., permitting the maintenance of an action against a county upon a contract "and not otherwise," or Section 6375, L. O. L., giving a right of action against a county in favor of one injured by a defect in the highway while lawfully traveling thereon, etc. As against a county the courts cannot proceed under the quoted excerpt from the organic act any further than the legislative power has pointed the way. In short, a county cannot be called to account at the suit of a private party for any default in its governmental functions unless there is a statute allowing it. No enactment has been pointed out sanctioning such procedure.

The judgment of the Circuit Court must therefore be reversed.

REVERSED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and
MR. JUSTICE BENSON concur.

Argued December 14, affirmed December 27, 1916.

HILLSBORO NAT. BANK v. GARBARINO.*

(161 Pac. 703.)

Pleading—Amendment—"Trial"—Statute.

1. Under Section 102, L. O. L., providing that the court may before trial and upon terms allow any pleading to be amended by adding any material allegation, and, at any time before the cause is submitted, may allow the pleading to be amended to correct a mistake, etc., or when the amendment does not substantially change the cause of action, or defense, and Section 113, defining a "trial" as the judicial examination of the issues between the parties, the allowance of an amendment to the complaint before any demurrer had been filed, and before the judicial examination of the issues had begun, was allowed before trial, and hence was admissible, although changing both the cause of suit and the *quantum* of proof required.

Pleading—Amendment—Answer.

2. Where defendant deemed himself injured or misled by an amendment to the complaint before trial, he should have taken leave to change his answer to meet the new situation.

Pleading—Right of Amendment—Construction.

3. The right of amendment should be liberally construed.

Evidence—Self-serving Declarations—Voluntary Conveyance.

4. In a suit to set aside a debtor's voluntary conveyance to his wife, her declarations to the scrivener who prepared the deed that her husband had wasted considerable money in drinking, that his health was poor, and that she took the conveyance to obviate the expense of administration of his estate were self-serving, and could not alter the effect imputed by law to the conveyance.

Fraudulent Conveyances—Conveyance to Wife—Presumption and Burden of Proof.

5. A husband's conveyance to his wife is presumptively fraudulent as against his existing creditors, and the wife has the burden of proving that it was made for a valuable consideration, in good faith, and without intent to defraud such creditors.

Fraudulent Conveyances—Remedies of Creditors—Indebtedness—Statute.

6. Section 7397, L. O. L., providing that every conveyance of lands with intent to hinder, delay or defraud creditors, etc., as against such creditors shall be void, is in favor of all creditors, and not of any particular class of creditors, so that there is no distinction between creditors whose claims are due and those whose claims are not due.

*On burden of proof as to fraud against creditors in transfer from husband to wife, see note in 56 L. R. A. 823. **REPORTER.**

Fraudulent Conveyances — Conveyance to Wife — Indebtedness — Evidence.

7. In a judgment creditor's suit to set aside a husband's voluntary conveyance to his wife, she is not estopped to go behind the judgment and inquire whether there was any actual indebtedness, and, estoppels being mutual, the creditor may show that the husband borrowed money from him and had not repaid it.

[As to whether gifts by husband to wife are fraudulent as to wife, see note in 24 Am. St. Rep. 490.]

From Washington: GEORGE R. BAGLEY, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is a suit by the Hillsboro National Bank, a corporation, against Natalio Garbarino and Rosa Garbarino, to set aside a voluntary conveyance made by a debtor husband to his wife. The original complaint declared that on March 6, 1914, the husband was the owner in fee simple and in possession of the realty in question, and on that date was indebted to the plaintiff in a certain sum of money, which he failed to pay, in consequence of which the plaintiff recovered judgment against him in the Circuit Court September 17, 1914. On this judgment an execution was issued March 27, 1915, and returned wholly unsatisfied on the 29th of the same month. It is said, also, that on March 6, 1914, prior to the entry of judgment in favor of the plaintiff already mentioned, but after the indebtedness upon which it was founded had been incurred, the defendant husband, for the purpose of defrauding the plaintiff and to prevent collection of the indebtedness, conveyed to the wife the realty mentioned by deed recorded March 7, 1914, in the record of deeds; that it was not then, and never since has been, exempt from execution; that the wife knew of the indebtedness of her husband to the plaintiff, and received the transfer of title with intent to defraud and prevent the plaintiff from collecting its demand, or any judg-

ment that might be rendered thereon. The plaintiff also avers that there was no consideration for the conveyance, and that the husband after he made the same had no property available for the satisfaction of the judgment. The wife alone defended.

The answer tendered the general issue to every allegation of the complaint except the plaintiff's corporate character and the existence of the marital relation between the defendants. No affirmative defense was offered.

When the case was called for hearing and before any testimony was tendered the plaintiff asked and obtained leave of court, over the objection of the defendant, to amend the complaint by changing the date March 6th, wherever the same appeared therein, to March 2d, so as to show that on the earlier, instead of the later, date the defendant husband was the owner of the property, was then indebted to the plaintiff, and made the conveyance as stated, which was recorded on March 11th, instead of March 7th. In permitting the amendment the court stated that the defendant might amend her answer, but, after learning from opposing counsel that it was the contention of the plaintiff that the indebtedness was one existing at the time the conveyance was made, the attorney for the defendant announced that he would proceed and not amend. After hearing the testimony the court made findings of fact, conclusions of law and a decree according to the prayer of the complaint, and the defendant, who appeared, appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Mr. G. E. Murphy* and *Mr. Lisle A. Smith*, with an oral argument by *Mr. Murphy*.

For respondent there was a brief and an oral argument by *Mr. Henry T. Bagley*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The defendant contends that the court had no right to allow the amendment when it did because it changed the character of proof required to maintain the plaintiff's suit in this: That according to the dates in the original complaint the judgment relied upon was rendered after the conveyance, and hence to overturn the transfer it would be incumbent upon the plaintiff to show that it was made for the express purpose of defrauding those from whom the grantor expected afterward to obtain credit, and that the amendment relieved the plaintiff of this burden, and imposed upon it only the lighter task of showing that the conveyance was purely voluntary, which would render it void as to precedent debts without any showing of an express intent to defraud. She relied upon Section 102, L. O. L., reading thus:

"The court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegation material to the cause; and in like manner and for like reasons it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense, by conforming the pleading or proceeding to the facts proved."

It will be observed that there are two different periods in litigation in which the court may allow an

amendment, one "at any time before the trial," and the other, "at any time before the cause is submitted." In the first stage the court is not restricted in the extent of the amendment to be allowed. In the other, the right fettered by the condition that the alteration does not substantially change the cause of action. In our judgment the amendment was tendered in the first period. No testimony had been offered, and although the trial began immediately after the amendment was effected, yet it had not commenced at the time the offer to change the pleading was made and allowed. Section 113, L. O. L., declares that:

"A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact."

See, also, 8 Words and Phrases, 7095.

The record does not disclose that any demurrer had been filed; hence there had been no trial of an issue of law. The judicial examination of the issues had not yet begun when the amendment was offered, and hence it was admissible, although it may have changed both the cause of suit and the *quantum* of proof required.

2. If the defendant deemed herself injured or misled by the amendment, she should have taken leave to change her answer to meet the new situation.

3. To give heed to her present contention on that point would be to violate the precedents, to the effect that the right of amendment should be liberally construed.

4. The evidence clearly shows that the answering defendant knew about the existence of the indebtedness to the plaintiff owing by her husband and the state, and amount of his property, and that she took the conveyance without paying any consideration whatever

for the same. Some testimony is offered from the scrivener who prepared the deed, in substance, that she explained to him that her husband had wasted a considerable sum of money in drinking; that his health was poor; that he was not expected to live long; and that she took the conveyance to obviate the expense of the administration of his estate after his death. These, however, are self-serving declarations, and cannot alter the effect which the law imputes to a purely voluntary conveyance made by a husband to a wife.

5. Owing to the intimate relation existing between the two, the precedents established by this court are to the purport that such conveyance is presumptively fraudulent as against existing creditors. Under such circumstances our own decisions cast upon the defendant the burden of proving that the conveyance was made for a valuable consideration, in good faith, and without intent to defraud those to whom the grantor was obligated for the payment of money: *Wright v. Craig*, 40 Or. 191 (66 Pac. 807); *Davis v. Davis*, 20 Or. 78 (25 Pac. 140).

6. Much reliance is placed by the defendants on the case of *Seed v. Jennings*, 47 Or. 464 (83 Pac. 872), and particularly upon the language here set down:

“To enable a creditor herein to maintain a suit to set aside a conveyance by the debtor as fraudulent and void, he must show an unsatisfied judgment or an attachment upon a cause of action existing at the time of the conveyance; or on a cause of action arising subsequent thereto, and that in the latter event the conveyance was made with the express intention of defrauding subsequent creditors.”

And, further, that:

“To avoid a voluntary deed because fraudulent as to existing creditors, the cause of action must exist at the time the conveyance is made, and this must ap-

pear from the record in the action in which the judgment was recovered."

The defense argues from this language that no "cause of action" arises until the creditor has a right to commence proceedings to recover his debt, with the resulting conclusion that unless the creditor's debt is past due when the conveyance is made, the transfer of title, although purely voluntary, cannot be overturned, unless it can be shown that it was made with the express purpose of defrauding subsequent creditors, and, moreover, that unless the judgment-roll in the action shall itself disclose that the debt was overdue at the date of the conveyance, the creditor is without standing to defeat the transfer. In part the language of Section 7397, L. O. L., is this:

"Every conveyance or assignment in writing or otherwise of any estate or interest in lands * * made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits * * as against the persons so hindered, delayed, or defrauded, shall be void."

We observe that the term "creditors" is not restricted to those whose demands are overdue. The statute is in favor of all creditors, and not any particular class of them. It is quite as culpable for the debtor to alienate his property with intent to defraud one whose claim is not yet due as thus to seek to injure one whose demand has matured. To distinguish between the two wrongs is not consonant with sound logic.

7. The language of the opinion in the *Seed-Jennings Case* respecting the judgment cannot be construed as applicable to the answering defendant here, because she was not a party to the same and is not bound thereby. She is not estopped to go behind the judg-

ment and inquire whether or not there was any actual indebtedness owing from her husband to the plaintiff. Estoppels are mutual, and if she is entitled to enter upon that field of inquiry, the plaintiff may accompany her upon her quest, and resisting her attack upon the judgment may show, as it did in this instance, that the defendant husband in truth had borrowed money from the plaintiff to the amount stated in the pleading, and had not repaid the same. The rule is thus stated in *Yeend v. Weeks*, 104 Ala. 331 (16 South. 165, 53 Am. St. Rep. 50):

“If, then, there is no more proof than the judgment itself—in the absence of fraud or collusion, as we have seen—it is evidence of the existence of a debt at the time of its rendition, and only at that time. This is sufficient to entitle the judgment creditor to impeach the fraudulent conveyance as tainted with actual fraud. In such case, the burden of proving the actual fraud would be upon the complainant. If the complainant, however, would use the judgment to the prejudice of a grantee in a deed alleged to be only voluntary and constructively fraudulent, there must be independent, distinct evidence of facts showing the cause of action which authorized the rendition of the judgment, and that it is older than the conveyance.”

The subject is learnedly discussed in *Eggleston v. Sheldon*, 85 Wash. 422 (148 Pac. 575), by Mr. Justice FULLERTON, not only permitting, but requiring in such instances, that the plaintiff shall show an actual indebtedness older than the conveyance attacked, where the reliance is upon a purely voluntary transfer of the title. Rightly understood in consideration of its facts, the case of *Seed v. Jennings*, 47 Or. 464 (83 Pac. 872), does not teach the contrary doctrine. There the father of the plaintiff, while the latter was yet a minor, conveyed to him certain real prop-

erty, being at the time free from debt of any nature and possessed of considerable other holdings. Three years later Jennings commenced an action against the elder Seed, charging him with the alienation of the affections of the former's wife, said to have been committed within the next preceding year, recovered judgment, and levied execution on the realty included in the deed from the father to his son. Clearly the claim accrued, not before, but after, the deed had taken effect; and, as there was no evidence whatever that the liability was in contemplation of anyone at the time the conveyance was made, the land was held exempt from the subsequent judgment. In this case, however, although it changed its form by the renewal of notes given for the same, the indebtedness accrued long prior to the conveyance. As we have seen, the statute makes no distinction between the creditors whose claims have matured and those unmatured. They are equally within the protection of the enactment. The effect of the conveyance to the wife was at least to hinder and delay the plaintiff in the collection of its debt. The decree of the Circuit Court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and MR. JUSTICE BENSON concur.

Argued November 1, affirmed December 27, 1916.

SKINNER v. FURNAS.

(161 Pac. 962.)

Specific Performance—Oral Contract—Possession.

1. It is possession of real property, and, when any relation of affinity or consanguinity exists between parties, also the improvements made upon the land by the purchaser pursuant to the vendor's oral agreement to sell and convey, that takes the case out of the statute of frauds and authorizes a court of equity to decree a specific performance.

Specific Performance—Complaint—Possession and Improvements.

2. Since an oral agreement and its part performance are the essentials to be established by evidence at the trial of a suit for specific performance, it is necessary that the complaint therein set forth the oral agreement and allege that possession was taken by the purchaser pursuant thereto, and that, if the parties are related, the latter has made improvements on the land.

Pleading—Insufficiency of Complaint—Cure by Reply.

3. Where the complaint, in a suit for the specific performance of an oral agreement to sell and convey land, did not allege that plaintiff took possession pursuant to any oral contract or otherwise, but the answer averred the entry and possession by complainant's husband without any contract and without the knowledge and consent of defendant mortgagors, and where the demurrer to the complaint was overruled, plaintiff, under a reply traversing the averments of new matter in the answer, might offer evidence to substantiate the issue as to the making of the oral contract for the purchase of the land and possession and improvements pursuant thereto.

Specific Performance—Purchase by Wife—Sufficiency of Evidence.

4. In a suit by a married woman for specific performance of an oral contract to sell and convey land, evidence held to establish the allegation of the complaint that she was the purchaser under the contract.

Vendor and Purchaser—Possession—Selection.

5. Where a purchaser takes possession of land by an indicated boundary, his right to the premises vests upon the selection.

Specific Performance—Oral Agreement—Mutuality.

6. Mutuality must exist when the aid of the court is invoked to enforce the rights of the parties to an oral contract for the sale of land, and where a recovery of the consideration and the execution of a deed could have been granted to either party when suit was begun, the oral contract was not wanting for mutuality.

[As to necessity of mutuality of remedy to specific performance and what it is, see note in 27 Am. St. Rep. 173.]

Specific Performance—Oral Agreement—Estoppel.

7. A married woman should not be denied specific performance of an oral contract to sell land because she permitted her husband to hold the legal title in trust for her, where defendants did not rely upon the husband's apparent legal title.

Dower—Mortgage—Effect—Statute.

8. Under Section 7289, L. O. L., relating to dower in land mortgaged for purchase money, the fact that a married woman made no contract, barring her inchoate right of dower, when plaintiff took possession and made improvements under an oral contract with her husband, was of no consequence, where she afterward joined her husband in executing to defendants a purchase-money mortgage, as the foreclosure of that lien and a sale of the premises under the decree concluded all the estate she had in the realty.

Mortgages—Foreclosure—Purchase by Mortgagee—Title.

9. A mortgagee, purchasing at a sheriff's sale with knowledge of plaintiff's prior equity in land as purchaser in possession under an oral agreement with the mortgagor, acquired no greater estate than the mortgagor held.

From Umatilla: GILBERT W. PHELPS, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by Mrs. Georgie A. Skinner against Leroy Furnas and Grace M., his wife, J. H. Reid and Genevieve, his wife, and the Umatilla Project Orchard Lands Company, a corporation, to enforce the specific performance of an oral agreement to convey real property. Mr. Furnas, being the owner in fee of the southwest quarter of the northwest quarter of section 11, in township 4 north, range 28 east of the Willamette Meridian, near Hermiston, Oregon, on October 1, 1910, with his wife conveyed such tract of land and other real property, containing in all 320 acres, to Mr. Reid, who was to discharge a mortgage of \$2,500 on the premises. The latter paid a substantial part of the consideration, and evidenced the remainder by three promissory notes of \$10,000 each, respectively maturing on the first day of October each year thereafter, with interest at 7 per cent from date, and to secure the payment thereof he and his wife at the same time exe-

cuted to Mr. and Mrs. Furnas a mortgage of the entire property. About November 1, 1910, at the solicitation of W. H. Skinner, the plaintiff's husband, Reid, in consideration of \$450, to be paid when a deed was executed, agreed to sell and convey a strip of land out of the southeast corner of the 40-acre tract, particularly described, possession of which small piece was taken, a house built thereon, and other improvements were made thereto, costing about \$4,500. Reid and his wife thereafter executed to the Umatilla Project Orchard Lands Company, a corporation, a quit-claim deed of all their interest in and to the northwest quarter of section 11, in the township and range mentioned. Default was made in the payment of the promissory notes, whereupon the mortgage securing them was foreclosed, in which suit, with others, Mr. Skinner, but not his wife, was made a party defendant. At a sale under the decree Furnas and his wife, on February 14, 1914, became the purchasers for the amount of the debt, costs, etc. They, on March 27, 1915, commenced an action against Mr. Skinner alone, to recover the possession of the small tract on which the house was built. He filed an answer in that action, denying the averments of the complaint, and for a separate defense alleging that he was not then, nor had he ever been, in possession of the demanded premises, nor did he claim any title or interest therein or right thereto. The reply put in issue the allegations of new matter in the answer, and the cause, being tried, resulted in a verdict and judgment in favor of Mr. Skinner, which determination has become final. Thereafter Furnas and his wife commenced against Skinner another action, in which his wife was joined, to recover possession of the small tract. An answer having been filed in that action, Mrs. Skinner, as

plaintiff, commenced this suit in the nature of a cross-bill in equity, setting forth the facts hereinbefore stated, and averring that about November 1, 1910, she "purchased from said J. H. Reid" a tract of land, beginning at a point where the north line of Ridgeway street in the town of Hermiston intersects the east boundary of the southwest quarter of the northwest quarter of section 11, township 4 north, range 28 east, and running thence north 200 feet, thence west 180 feet, thence south 200 feet, to the north line of Ridgeway Street and thence east 180 feet to the place of beginning. "That thereupon the plaintiff entered into the immediate possession of the said piece or parcel of land, and has ever since remained in the quiet, peaceable and undisturbed possession thereof." The complaint details the improvements so made upon the premises, and avers:

"That thereafter plaintiff learned defendant Reid could not make plaintiff a good and sufficient deed of conveyance, and this plaintiff caused the said Grace M. Furnas and the said Leroy W. Furnas to be notified of the purchase of the said tract of land from the said J. H. Reid, and that the purchase price had not been paid."

That the Umatilla Project Orchard Lands Company secured its deed with knowledge of the plaintiff's possession of a small part of its land and of her rights thereto, and that Furnas and wife, upon the sale of the entire lands under the decree of foreclosure, took the naked legal title of the disputed tract with knowledge that the plaintiff was in the possession thereof and had placed valuable and permanent improvements thereon. With the filing of the complaint herein the plaintiff deposited with the clerk of the trial court \$450 and interest at 7 per cent per annum from No-

vember 1, 1910, amounting to \$615, for the benefit of the persons who might be entitled thereto.

The defendants Reid and his wife and the Umatilla Project Orchard Lands Company, having been duly served with process in this suit, each failed to appear or answer. The defendants Furnas and his wife demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of suit. The demurrer was overruled, whereupon they, alone answering, denied the material averments of the complaint, and for a further defense alleged that about January 1, 1911, Mr. Skinner sought to enter into an agreement with Mr. Reid to purchase a small tract of land; that they could not concur in the boundaries nor as to the purchase price, and thereupon Skinner began the erection of the dwelling and the making of the improvements "without any contract or agreement with the said J. H. Reid * * and without the knowledge or consent of these defendants or either of them. * * That the said plaintiff never at any time had the sole possession or sole occupancy of the said premises, or any part thereof, and never expended any moneys or placed any improvements upon said tract of land, nor performed anything with respect thereto, except to reside in said house as the wife of the said W. H. Skinner."

The reply put in issue the averments of new matter in the answer, and further alleged that Furnas and his wife ought to be estopped to aver or prove that Mr. Skinner claimed to be the owner of the demanded premises, for that the judgment rendered in his favor in the first ejectment action had conclusively determined the matter to the contrary. The cause was thereupon tried, resulting in a decree as prayed for in the complaint, awarding the money so deposited to

Furnas and his wife, and requiring them, within 30 days, to execute to Mrs. Skinner a good and sufficient deed of the premises, and that in default thereof the decree stand as and for a conveyance of the tract of land in dispute. From this decree Mr. and Mrs. Furnas appeal.

AFFIRMED.

For appellants there was a brief over the name of *Messrs. Raley & Raley*, with an oral argument by *Mr. James H. Raley*.

For respondent there was a brief with oral arguments by *Mr. James A. Fee* and *Mr. Alger Fee*.

Opinion by MR. CHIEF JUSTICE MOORE.

Invoking the doctrine announced in *Barrett v. Schleich*, 37 Or. 613, 617 (62 Pac. 792), where it is said:

“The parol agreement to convey real property is the foundation, and the part performance thereof by the purchaser is the superstructure, which, considered as a unity, authorizes a court of equity specifically to enforce the contract”

—it is maintained by appellants’ counsel that, the complaint having failed to aver that a parol agreement to purchase the tract of land was ever consummated, or that pursuant to the terms of any contract possession of the premises was taken and improvements were made, the initiatory pleading does not state facts sufficient to constitute a cause of suit, and, this being so, an error was committed in overruling the demurrer interposed on that ground, which mistake was not cured by answering over. It is argued by plaintiff’s counsel that the use of the word “purchase” in the primary pleading implies the consummation of an agreement by the vendor to sell, and the purchaser

to buy, property, and that having alleged a purchase of the land, and "that thereupon the plaintiff entered into the immediate possession" thereof, reasonably shows that possession was taken pursuant to the terms of the contract, and, such being the case, the complaint is sufficient in these particulars. In support of the legal principle thus asserted reliance is placed upon the case of *Cantwell v. Barker*, 62 Or. 12 (124 Pac. 264), where in a statement of the facts involved it is said:

"On July 14, 1911, plaintiff commenced this suit against Barker and wife to compel specific performance of a contract of sale of certain town lots, alleging that in October, 1907, defendants, by a verbal contract, sold to plaintiff lots 5 and 6, in block 30, of Condon and Cornish's Addition to Condon, Oregon, for the agreed price of \$800; that, immediately upon the purchase, plaintiff entered into possession of the lots and expended \$230 in erecting an additional building thereon; and that he has remained in exclusive possession as the owner thereof," etc.

An examination of the printed abstract in that case shows that paragraph 2 of the complaint reads:

"That on or about the month of October, 1907, the defendants W. L. Barker and Annie L. Barker, by a verbal contract of the last-named date, sold and delivered possession of the above-described premises [referring to the preceding paragraph of the complaint] to the plaintiff herein, under said contract, and he, the plaintiff, has continued in possession of said premises from that time until the present, and has made valuable improvements thereon, and has ever since held possession as the exclusive owner of said property": 277 Or. Briefs, 118.

It will thus be seen the complaint in the cause mentioned substantially alleges that possession of the lots was delivered by the defendants to the plaintiff pur-

suant to the terms of the oral agreement. An examination of the statement of facts in the case relied upon will show that the excerpt hereinbefore set forth is not indicated in that opinion by quotation marks.

1. It is possession of real property, and, when any relation of affinity or consanguinity exists between the parties, also the improvements made upon the land by the purchaser, pursuant to the terms of an oral agreement with the vendor to sell and convey the premises, that takes the case out of the statute of frauds and authorizes a court of equity, in a suit instituted for that purpose, to decree a specific performance of the contract.

2. Since the agreement and its part performance are the essential prerequisites to be established by evidence at the trial, it is necessary to the maintenance of a suit of this kind that the complaint should set forth the oral contract, and also allege that pursuant to its terms possession of the premises was taken by the purchaser, and, if the parties are related, that the latter has made improvements upon the land: *Barrett v. Schleich*, 37 Or. 613 (62 Pac. 792); *Zeuske v. Zeuske*, 62 Or. 46 (124 Pac. 203); *Thayer v. Thayer*, 69 Or. 138 (138 Pac. 478). A tenant in possession of real property under a written lease, which grants him a privilege to purchase the premises, may, when the option is accepted within the time and upon the terms specified, maintain a suit for specific performance of the contract without change of possession: *House v. Jackson*, 24 Or. 89 (32 Pac. 1027); *Merrill v. Hexter*, 52 Or. 138 (94 Pac. 972, 96 Pac. 865). In these instances it was the writing that took the cases out of the statute of frauds.

In *Aitkin's Heirs v. Young*, 12 Pa. 15, 24, in speaking of the acts of part performance which will take

an oral agreement relating to land out of the statute of frauds, Mr. Justice ROGERS remarks:

“That in order to constitute a good title by parol the possession must be contemporaneous with, or immediately consequent on, the contract, and in pursuance of it, and that these facts must be established by clear, precise, and satisfactory evidence.”

The importance of taking possession of real property, pursuant to the terms of an oral agreement to sell and convey land, is illustrated by the decision in *Roberts v. Templeton*, 48 Or. 65 (80 Pac. 481). See, also, the very extended notes to this case in 3 L. R. A. (N. S.) 790.

3. In the case at bar the complaint does not allege that the plaintiff took possession of the demanded premises pursuant to the terms of any agreement oral or otherwise.

It will be kept in mind, however, that the answer substantially avers the entry upon and possession of the land by W. H. Skinner were taken and held without any contract or agreement with Mr. Reid or anyone for the purchase of the land, and without the knowledge or consent of either Mr. or Mrs. Furnas, which allegation was controverted by the reply. After the demurrer was overruled, the allegations of the answer hereinbefore quoted gave the plaintiff by her reply the opportunity to offer evidence to substantiate the issue as to the making of the oral contract with Reid for the purchase of the tract of land, and that pursuant to the terms of that agreement possession of the premises was taken and improvements thereon were made. If the controversy raised by the reply had been stated as new matter in that pleading and not as a denial of the averments of the answer, there would have been no departure, but a mere enlarge-

ment of the averments of the complaint: *Mayes v. Stephens*, 38 Or. 512 (63 Pac. 760, 64 Pac. 319); *Crown Cycle Co. v. Brown*, 39 Or. 285 (64 Pac. 451); *Kiernan v. Kratz*, 42 Or. 474 (69 Pac. 1027, 70 Pac. 506); *Zorn v. Livesley*, 44 Or. 501 (75 Pac. 1057); *Pioneer Hardware Co. v. Farrin*, 55 Or. 590 (107 Pac. 456). If, therefore, the averments of the complaint are insufficient in the respects mentioned, the new matter in the answer waived the defects in these particulars.

4. It is maintained that the testimony received was insufficient to establish the allegations of the complaint that Mrs. Skinner was the purchaser of the tract of land under the oral contract to convey, and, this being so, an error was committed in decreeing her the relief sought. Evidence of many circumstances was given by defendants' counsel tending to prove that Mr. Skinner was named as the grantee in several conveyances of real property as to which deeds his wife testified he held the legal title in trust for her, which sworn declarations are corroborated by the testimony of her husband. Thus it appears he owned in his own right an undivided one fourth of a part of the town site of Hermiston, Oregon, and also held the legal title to an equal interest in the same real property in trust for his wife. It also appears that at a school meeting, held in that town, at which assembly there was quite a rivalry between different sections of the district respecting local matters, Mrs. Skinner's right to vote was challenged on the ground that she was not a qualified elector, but upon Mr. Skinner's declaration that she was the equitable owner of an interest in the town site she was allowed to vote. Mr. Skinner was also named as the grantee in a conveyance of land which was exchanged for lumber that was used in building the house on the disputed premises, but he testified

that as to such premises he held the legal title in trust for his wife. One circumstance seems to discredit his testimony, and that is the new house was insured in his name. In explaining this matter, however, he states upon oath that the policy was thus issued by mistake of the agent.

The testimony shows that Mrs. Skinner owned a desert land claim near Hermiston, which right she sold, expecting to use the money as it matured under the terms of the agreement in completing the new house and improving the tract of land she had agreed to purchase. She was disappointed in the collection of the money thus due her, and was obliged to resort to expedients in order to meet the payment of her obligations. She with her husband borrowed from the Hermiston Bank & Trust Company \$2,750 and \$1,455, respectively, pursuant to an agreement that, if demanded, she would give as security a mortgage of her desert land claim.

J. H. Reid, having testified that \$450 was agreed upon as the consideration to be paid for the tract of land desired, and that prior to concluding the bargain therefor he walked over the premises with the plaintiff's husband, was asked:

"Didn't Mr. Skinner state to you at the time of that purchase, Mr. Reid, that the land was being purchased as a home for Mrs. Skinner, and the lots must be satisfactory to her, or words to that effect?"

The witness answered: "Yes, sir." Notwithstanding the circumstances adverted to, it is believed Mr. Skinner was acting as the agent of his wife, and not on his own account, when he negotiated with Mr. Reid, the then owner of the entire lands, for the purchase of the small tract; that she then had reason to believe, and did believe, that from the proceeds of the sale of her

desert claim she would receive a sufficient sum of money with which to pay for the land in question and to put up the buildings and make improvements thereon.

5. It is insisted that no agreement was reached respecting the boundaries of the land Reid was to sell and convey, and hence an error was committed in granting the relief decreed. The testimony shows that prior to concluding the mere oral agreement Mr. Reid went to the southeast corner of the small tract desired, and pointed out the particular land involved, one boundary of which might possibly be shortened to coincide with the line of an alley when the larger premises were surveyed and platted into lots and blocks, which has never been done. It also appears that with his knowledge and consent Mrs. Skinner took possession of the parcel of land so indicated, and improved it to the extent of the boundaries thus designated. When, under such circumstances, the purchaser takes possession of land by an indicated boundary, his right to the premises vests upon the selection: 1 *Dembitz, Land Titles*, 36; *Richards v. Snider*, 11 Or. 197 (3 Pac. 177); *Guillaume v. K. S. D. Land Co.*, 48 Or. 400 (86 Pac. 883, 88 Pac. 586); *Purinton v. Northern Ill. R. Co.*, 46 Ill. 297. No error was committed in this respect.

6. It is maintained that the alleged oral agreement was not mutual, and for that reason an error was committed in decreeing specific performance. In *Brown v. Munger*, 42 Minn. 482 (44 N. W. 519), a headnote on this subject reads:

“In order that specific performance of an agreement for the sale, exchange, or conveyance of land be decreed, it is not absolutely essential that there be mutuality of remedy *ab initio*. But the mutual enforcement of the contract should be practicable when

specific performance is adjudged. The court should then be able to enforce by its decree all of the terms, *in praesenti*; should have the power to supervise the performance of the contract by each of the parties, and in all of its parts."

Another part of a headnote to that case is as follows:

"The legal principle that contracts must be mutual does not mean that each party must be entitled to the same remedy for a breach by the other. There must be mutuality of obligation, but not necessarily mutuality of remedy."

See, also, *House v. Jackson*, 24 Or. 89 (32 Pac. 1027); *Cooper v. Thomason*, 30 Or. 161 (45 Pac. 296); *West v. Washington Ry. Co.*, 49 Or. 436 (90 Pac. 666). Mutuality must exist when the aid of a court is invoked to protect and enforce the rights of the parties by its decree; and, as a recovery of the consideration and the execution of a deed could have been granted to either party when this suit was instituted, the oral contract was sufficient in this particular.

7. Neither Mr. nor Mrs. Furnas, relying upon Mr. Skinner's apparent legal title in or to the real property which he asserts he held in trust for his wife, permitted him to become a debtor upon faith in such credit, and, this being so, Mrs. Skinner should not be denied an exercise of her legal right to specific performance of the oral contract to convey the land, because she had such confidence in her husband as to allow him to hold in trust for her the legal title to her property.

8. No contract appears to have been made with Mrs. Reid, whereby her inchoate right of dower to the land involved in this suit was barred when Mrs. Skinner took possession of the premises and made such valuable and permanent improvements thereon. Any failure in this respect, however, is now of no consequence, for, Mrs. Reid having joined her husband in executing

to Mr. and Mrs. Furnas a purchase-money mortgage, the foreclosure of that lien and the sale of the premises under the decree effectually concluded all possible estate Mrs. Reid had in the real property: Section 7289, L. O. L.; 14 Cyc. 952; *Mansfield v. Hodgdon*, 147 Mass. 304 (17 N. E. 544).

9. Mr. and Mrs. Furnas, the purchasers at the sheriff's sale, though they may have been restored to their original estates as to all the land, except the small tract, took, as to the latter strip, only the naked legal title: *May v. Emerson*, 52 Or. 262 (96 Pac. 454, 16 Ann. Cas. 1129); *Cantwell v. Barker*, 62 Or. 12 (124 Pac. 264). They took with knowledge of the plaintiff's equity, and hence acquired no greater estate than Reid held: *Dimmick v. Rosenfeld*, 34 Or. 101 (55 Pac. 100); *Jennings v. Lentz*, 50 Or. 483 (93 Pac. 327, 29 L. R. A. (N. S.) 584); *Smith v. Farmers & Merchants' Nat. Bank*, 57 Or. 82 (110 Pac. 410).

The lien created by the mortgage of the entire 320 acres, executed by Mr. and Mrs. Furnas to secure the payment of \$2,500, for water rights appurtenant to the premises, was not disturbed by the decree rendered herein, nor could it have been, for that mortgagee was not made a party to this suit. If, however, Mrs. Skinner is compelled to pay any part of that sum, she can be subrogated and enforce the lien against the remainder of the land, after a merger as to her separate tract.

A careful examination of the testimony leads to the conclusion that the decree should be affirmed; and it is so ordered.

AFFIRMED.

Demurrer to alternative writ argued December 5, 1916, and sustained January 2, 1917.

STATE ex REL. v. MULTNOMAH COUNTY.

(161 Pac. 959.)

Counties—Liability—Acts of Officers.

1. In the absence of statute, a county is ordinarily not liable for defaults of its officers.

Counties—Statute Imposing Liabilities.

2. Laws of 1915, Chapter 62, making a county liable for money lost by a former county clerk by failure of a bank in which he deposited a litigant's funds, should be strictly construed.

Counties—Officers—Liabilities—Clerk.

3. A county clerk is not liable for money which never came into his possession.

Mandamus—Officers—Duties and Liabilities—Clerk.

4. Under Laws of 1915, Chapter 62, directing that a county clerk be given credit for certain funds lost by his predecessor, and directing the clerk to return such funds to the parties entitled thereto, the clerk cannot comply with the latter requirement, without rendering himself liable, until the money collected is delivered to him, and, no express provision having been made therefor by said act, *mandamus* will not lie to compel the county commissioners to deliver the funds raised by taxation to the county clerk.

[As to *mandamus* to enforce duty imposed by permissive words in statute, see note in *Ann. Cas.* 1915A, 450.]

Mandamus—Grounds—Freedom of Question from Doubt.

5. *Mandamus* will not lie unless the ministerial duty imposed by law is free from doubt.

Original proceedings in Supreme Court.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This is a special proceeding to compel the performance of an act which it is alleged the law enjoins as a duty resulting from an office. An alternative writ of *mandamus*, issued from this court, substantially states that the relator, John B. Coffey, is the county clerk of Multnomah County, Oregon; that his predecessor in office, F. S. Fields, pursuant to the provisions of a

statute applicable to that county, collected in advance from parties litigant certain sums of money on account of fees, which when earned were paid over to the county treasurer, and the remainder was held in trust for the depositor, to be returned when his cause was finally determined, if the prescribed fees earned for the services performed did not exhaust the payment exacted (Section 1114, L. O. L.); that Fields deposited the money so received, and not earned by the county as fees, with the American Bank & Trust Company, which failed, and by reason thereof he was unable, when his term of office expired, to deliver to Coffey \$15,522.43 which had been so left with the bank; that in order to meet the payment of such loss a tax was duly levied for that purpose by the County Court of Multnomah County, pursuant to the provisions of an enactment filed in the office of the Secretary of State February 10, 1915 (Gen. Laws Or. 1915, c. 62, p. 71), and the sum of money stated has been collected and is now in the county treasury; that on November —, 1916, the relator demanded in writing of the defendants Rufus C. Holman, W. L. Lightner, and Philo Holbrook, as members of and constituting the board of county commissioners of that county, that an order be passed directing the issuance of a warrant on the general fund of that county payable to the relator as county clerk in the sum of \$15,522.43, to make good such deficiency, and to transmit the command to the county auditor for final account, but the defendants then and now refuse to comply therewith, on the ground that no efficient means has been provided by law whereby such credit could be allowed. The defendants were required forthwith to assemble as the board of county commissioners and make the order so requested, or in default thereof to show, at a day

and hour specified, why they had not done so, and then and there to return the mandate.

A demurrer to the writ challenges its sufficiency on the ground that it does not state facts sufficient to authorize the relief demanded.

DEMURRER SUSTAINED.

Mr. Walter H. Evans, District Attorney, and *Mr. Arthur A. Murphy*, for the demurrer.

Mr. Martin L. Pipes and *Mr. John B. Cleland*, contra.

Opinion by MR. CHIEF JUSTICE MOORE.

The question to be considered is whether the statute referred to prescribes the means of disbursing to the persons entitled thereto the moneys so collected by taxation. Section 1 of the enactment substantially directs the County Court of Multnomah County, Oregon, to make good the loss of \$15,522.43 "by giving the present county clerk, John B. Coffey, credit in his fee account to the amount of said deficiency": Laws Or. 1915, c. 62, p. 71. The other parts of the statute, so far as material herein, read:

"That the said John B. Coffey shall pay to litigants having funds as shown by the records of the said county clerk's office due them on account of said litigants' deposit fund, the full amount thereof as the same shall become due to them under the existing laws of the state, and shall also permit papers to be filed and charged against said several funds to the same extent as though he had received said money in full from the said F. S. Fields": Section 2.

"The auditor and treasurer of Multnomah County, Oregon, shall give the said John B. Coffey credit for the full amount of said deficiency, and shall charge against said amount the fees earned by said county clerk and charged against the credits on the records of

his office which stood to the credit of said litigants at the time the said F. S. Fields retired from office. As soon as said several items of litigation have been concluded and all of the litigants have been paid the balance due them under the laws of the state, the county clerk shall pay over to the county treasurer the balance of the fund received by him from the said F. S. Fields": Section 3.

1. The rule is quite general that, in the absence of a statute imposing upon a county liability for the default of any of its officers in the performance of a duty enjoined by law, a private party who suffers injury by reason of a breach of such duty cannot maintain an action against the *quasi* corporation to recover the damages sustained: 11 Cyc. 498. Thus in *Vigo Tp. v. Knox County*, 111 Ind. 170 (12 N. E. 305), it was ruled that a county treasurer was not such an agent of the county as to render it liable for his misappropriation of public funds, in the absence of a statute creating the responsibility. To the same effect, see, also, *Cedar Rapids, I. F. & N. W. Ry. Co. v. Cowan*, 77 Iowa, 535 (42 N. W. 436); *State ex rel. v. Spinney*, 166 Ind. 282 (76 N. E. 971).

2. In the case at bar the statute by express terms makes Multnomah County, Oregon, which is a party hereto, liable for the money lost by F. S. Fields, its former county clerk, in consequence of the failure of the bank in which he deposited the litigants' funds. In referring to such enactments a text-writer observes:

"As counties are not suable except by statute, the mode pointed out by the statute must be strictly pursued": 7 R. C. L. 966.

The enactment relied upon herein is therefore to be strictly construed.

3. It will be remembered that Section 1 of the statute under consideration commands the County Court of

Multnomah County, Oregon, to give the relator credit in his fee account for an amount of money equal to the deficiency mentioned. No part of that sum ever came into his possession, and for that reason he is not legally chargeable therewith or required to account therefor: *Haradon v. Coffey*, 66 Or. 80 (133 Pac. 815). To the same effect see *Cedar Rapids, I. F. & N. W. Ry. Co. v. Cowan*, 77 Iowa, 535 (42 N. W. 436), where, in discussing a right of action against a public officer, it is said:

“It is insisted, on behalf of appellants, that plaintiff’s only remedy is by *mandamus* against the treasurer of Hardin County. But he never received any of the money in controversy, and is not liable for it”—citing in support of the language quoted the case of *Minneapolis & St. L. Railway Co. v. Becket*, 75 Iowa, 183 (39 N. W. 260).

The relator herein never having been charged with any of the money so lost it is difficult to understand why he should be given credit therefor. It was evidently the practice of his predecessor in office to deposit in a bank the litigants’ fund when received and to issue checks to the proper officer for sums of money as they were earned by the county as fees for services performed by the county clerk, and also to issue checks to parties for any remainder in his possession due them when their causes were finally determined. A party to a suit or action who had advanced sums of money on account of fees was not obliged, every time it became necessary to file a paper, to pay the prescribed fee, since it was charged to his account as the service was performed, and he was not permitted wholly to exhaust the money required to be paid beforehand until his cause was ultimately adjudicated: Section 1114, L. O. L. By keeping the money thus collected in a bank subject to check the county clerk had

constant control of the litigants' fund and could disburse it as the law required. If the act of February 10, 1915, had directed the County Court of Multnomah County to cause the issuance of a warrant in favor of the relator for \$15,522.43, or to deposit that amount in some reputable bank in Portland, Oregon, for his account, subject to check, he could have been legally charged with the money, and might then have disbursed it as provided by statute, receiving proper credit therefor on or before the fourth day of each month upon a report thereof: Section 3056, L. O. L.

4. The demurrer confesses that the deficiency in the litigants' fund has been made good by the County Court as an available asset by levying and collecting a tax for that purpose, and, this being so, no mandatory writ is necessary to compel a performance of that duty, which has already been discharged: *Jacksonville School Dist. v. Crowell*, 33 Or. 11 (52 Pac. 693).

5. It will be remembered that Section 2 of the act in question required John B. Coffey, as county clerk, to pay litigants having funds as shown by the records of his office the full amount thereof as the same shall become due, and also to permit papers to be filed and charged against the several funds to the same extent as though he had received the money in full from the former county clerk. The relator cannot comply with this requirement without rendering himself and his bondsmen liable, until the sum of money so collected has been placed at his disposal. No express provision therefor has been made by the enactment. *Mandamus* will not lie unless the ministerial duty enjoined by law is free from doubt: *Habersham v. Sears*, 11 Or. 431 (5 Pac. 208, 50 Am. Rep. 481); *Mackin v. Portland Gas Co.*, 38 Or. 120 (61 Pac. 134, 62 Pac. 20, 49 L. R. A.

596); *State ex rel. v. Malheur County Court*, 46 Or. 519 (81 Pac. 368).

The demurrer should be sustained, and it is so ordered.

DEMURRER SUSTAINED.

MR. JUSTICE BEAN, MR. JUSTICE HARRIS and MR. JUSTICE BENSON concur.

Argued June 21, reversed July 11, 1916.
Sustained on rehearing January 2, 1917.

OUTCAULT ADVERTISING CO. v. BROOKS.*

(158 Pac. 517; 161 Pac. 961.)

Bailment—Elements.

1. An order for advertising material, consisting of cuts and font of type to be held at the expiration of the contract subject to the order of the addressee, on acceptance, consummated a contract by which the possession of specific articles of personalty was to be transferred temporarily from the owner to others to accomplish a special purpose, and hence the agreement was a bailment.

Bailment—Elements—Delivery.

2. Delivery is the essential element of a bailment, which trust relation begins when the possession of personalty is transferred to the bailee.

Bailment—Liabilities of Parties.

3. Under an order by defendants to "ship us at our expense" advertising material to be held subject to plaintiff's order at the termination of the contract, where the plaintiff delivered the advertising matter for shipment to a carrier selected by it before defendants countermanded their order, the defendants are liable for the sum they agreed to pay for use of the advertising matter.

Bailment—Contract—Executed Contract—Damages for Breach.

4. Where defendant ordered advertising matter from plaintiff, which was to be used for one year and then held subject to plaintiff's orders, the contract became executed when the goods were delivered to a carrier consigned to defendant, the same as in the case of a sale, and defendant's refusal thereafter to accept the goods did not render the contract executory so as to prevent plaintiff from recovering the entire contract price and to limit his recovery to damages merely.

[As to difference between a sale and a bailment, see notes in 10 Am. Dec. 490; 2 Am. St. Rep. 711; 94 Am. St. Rep. 216.]

*On damage for breach of advertising contract, see note in 22 L. R. A. (N. S.) 272. REPORTER.

From Marion: PEROY R. KELLY, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This action was commenced in March, 1915, by the Outcault Advertising Company, a corporation, against John H. Brooks and George Steelhammer, to recover the sum of \$109.20. The cause, being at issue, was tried by the court, which made findings of fact in substance as follows: (1) That at all the times mentioned herein the plaintiff was, and now is, a corporation organized and existing under the laws of the State of Illinois, and the defendants, John H. Brooks and George Steelhammer, were and are partners engaged in business at Silverton, Oregon, under the firm name of Brooks & Steelhammer. (2) That the defendants delivered to the plaintiff's agent a writing which reads:

"To Outcault Advertising Co., 508 S. Dearborn St., Chicago, Ill.

"Order No. ——. Date, October 13, 1913.

"Ship us at our expense as per samples shown, your Drug Store Boy 'Ad' Service, to cover a period of one year, beginning Jan. 1st, 1914. This service to consist of 52 Drug Store Boy Cuts; 1 font type. [Signed] Brooks & Steelhammer. We (or I) agree to pay you net cash monthly, at the rate of 2.10 per week, for one year, we (or I) to have exclusive right to use the above Drug Store Boy 'Ad' service in our city only, and to hold type and cuts subject to your order when this contract expires. Failure to pay any installment when due renders full amount of this contract due. This contract cannot be canceled. Ship all at one time if possible.

"[Signed] BROOKS & STEELHAMMER."

(3) That on October 17, 1913, the plaintiff, upon the receipt of such order, accepted it and so notified the

defendants. (4) That on October 24, 1913, the plaintiff delivered to the Chicago & Northwestern Railway Company, a common carrier selected by it, the goods so ordered, consigned to the defendants at Silverton, Oregon. (5) That prior to the arrival of such goods, the defendants notified the plaintiff that they would not receive them, and that they had canceled and countermanded the order therefor. (6) That such goods arrived at Silverton, Oregon, and the defendants, though notified thereof, refused to accept them or to make any payment for their transportation. (7) That the defendants have refused to pay any sum on the written contract or to be bound thereby. (8) That the goods so referred to were carried in stock for delivery by the plaintiff, and were not made up on special order of the defendants. As a conclusion of law the court found, "That an order of nonsuit without prejudice should be made herein." A judgment having been given in accordance therewith, the plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Mr. Todd A. Rinehart* and *Messrs. McNary, Smith & Shields*, with an oral argument by *Mr. Rinehart*.

For respondents there was a brief and an oral argument by *Mr. Custer E. Ross*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. The question to be considered is whether or not the findings of fact support the conclusion of law predicated thereon. This inquiry necessarily depends upon a determination as to whether or not a delivery of the goods to a common carrier selected by the plaintiff was equivalent to a transfer of the possession from

it to the defendants. As the writing, signed by the defendants, expressly stipulated that they were to hold the type and cuts subject to the plaintiff's order, it conclusively appears from the memorandum that a redelivery of the goods was contemplated by the parties. It will thus be seen that the written order, when accepted by the plaintiff as found by the court, consummated a contract by which the possession of specific articles of personal property was undertaken temporarily to be transferred from the owner to others for the accomplishment of a special purpose, and hence the agreement was a bailment: Elliott, Contracts, § 2985; *State v. You*, 20 Or. 215 (25 Pac. 355). At Section 3072 of his valuable work on Contracts, Judge ELLIOTT says:

"The contract is merely executory until delivery by the bailor to the bailee and acceptance by the latter, when the bailment relationship commences."

"The property, the subject of the bailment," says another writer, "must come to the possession of the bailee, and to that end there must be some sort of delivery, actual or constructive": Van Zile, *Bail. & Car.* (2 ed.), § 18.

In the next section this author further remarks:

"The delivery must be such in every case as will give the bailee absolute and complete control of the property bailed."

To the same effect, see, also, Schouler, *Bail. & Car.* (3 ed.), § 132.

2. Delivery is the essential element of a bailment, which trust relation begins when the possession of the personal property is transferred to the bailee: Dobie, *Bail. & Car.*, § 10. Mr. Mechem in his work on Sales (Volume 2, Section 1181), in discussing the undertaking of a seller to "send," "ship" or "forward" goods, and the manner of satisfying such obligation, says:

“It is obvious that the agreement of the seller or the direction of the buyer to send the goods to the latter may have a variety of meanings, including even an actual transportation and delivery by the seller to the buyer at the point of destination as a condition precedent to the passing of the title. In the ordinary case, however, where specific goods are sold at one place which the buyer desires to have delivered at another, and the seller expressly or impliedly agrees, or the buyer directs him, to send them to that place, without specifying the means or method, this agreement or direction is satisfied when the seller has delivered the goods to a common carrier consigned to the buyer at the place specified.”

To the same effect, see Benjamin on Sales (2 Am. ed.), §§ 181, 693; 24 Am. & Eng. Ency. Law (2 ed.), 1071; 35 Cyc. 193; *Woodbine Children's Clothing Co. v. Goldnamer*, 134 Ky. 538 (121 S. W. 444, 20 Ann. Cas. 1026); *Gibson v. Inman Packet Company*, 111 Ark. 521 (164 S. W. 280, Ann. Cas. 1916A, 1043).

3. In *Herring-Marvin Co. v. Smith*, 43 Or. 315 (72 Pac. 704, 73 Pac. 340), it was determined that a contract of conditional sale, providing for shipment by the vendor at a distant point “via best route,” stipulating for safe delivery on cars at the city where the purchaser lived, at which time he would repay the vendor the freight bill, was a contract to deliver to the buyer at the place where he lived, and a delivery to the carrier for shipment was not a delivery to the buyer. In that case the part of the written order that is deemed material reads:

“Please ship as directed one number 185 safe * * marked to James R. Smith, town of La Grande, county of Union, and State of Oregon, via best route, for which I agree to pay to your order the sum of \$321.00 gold coin, rent as follows: Fgt. on arrival, and balance in six equal payments of 30 days each, to date from arrival of safe in La Grande, or 5 per cent said balance

in 30 days from arrival, for safe delivery on cars at La Grande, Oregon."

In rendering that decision Mr. Justice WOLVERTON quotes from Benjamin on Sales (2 ed.), Section 693, to the effect that a delivery to a common carrier, pursuant to a purchaser's order to "ship" the goods requested, was a surrender of the possession to an agent of the purchaser, but that a stipulation for safe delivery on cars at place of destination took the case out of that rule. There is no great distinction between a conditional sale and a bailment: Mechem, Sales, § 582. In *Outcault Advertising Co. v. Buell*, 71 Or. 52 (141 Pac. 1020), under a written request similar to that herein, it was held that when one, ordering advertising matter, wrote to the bailor, stating he could not arrange with his local paper for satisfactory advertising space within reasonable terms, and requesting that the material ordered should not be forwarded till he felt in better condition to handle it, the letter did not constitute a sufficient revocation of the order, even if the bailee had a right to rescind. In that case a part of the material ordered had been sent by express, and the charges therefor paid by the bailee. This receipt and payment amounted at least to a partial delivery and acceptance of the goods ordered.

It will be remembered that the written order contained the clause, "Ship us at our expense" the goods requested. The words last quoted authorized the plaintiff to select as the defendants' agent the common carrier so chosen. The bailor having thus complied with all the terms of the contract and delivered the goods to the defendants before they countermanded the order, they are liable thereunder for the sum of money which they agreed to pay for the use of the advertising matter.

The findings of fact do not support the conclusion of law based thereon; and, such being the case, the judgment is reversed, and the cause will be remanded, with directions to render a judgment in favor of the plaintiff and against the defendants for the sum of \$109.20.

REVERSED.

MR. JUSTICE BEAN, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Argued on rehearing December 12, 1916, former opinion sustained January 2, 1917.

ON REHEARING.

(161 Pac. 961.)

In Banc. Former opinion adhered to on rehearing.

For appellant there was a brief over the names of *Messrs. McNary, Smith & Shields* and *Mr. Todd A. Rinehart*, with oral arguments by *Mr. Roy F. Shields* and *Mr. Rinehart*.

For respondents there was a brief and an oral argument by *Mr. Custer E. Ross*.

MR. JUSTICE BURNETT delivered the opinion of the court.

4. This is the second hearing of this case. In an opinion written by Mr. Chief Justice MOORE and reported *ante*, p. 434 (158 Pac. 517), the court reversed a nonsuit, entered on motion of the defendants, and directed a judgment to be rendered by the Circuit Court in favor of the plaintiff. By their petition for

rehearing the defendants urged upon us that the findings of fact showed the contract involved to have been yet executory when the defendants canceled the order, with the consequence that the plaintiff had no cause of action for the stipulated price, but was restricted to an action for damages for the breach of the covenant by the defendants. It will be remembered that the latter signed and delivered to the plaintiff through its agent the following writing:

"To Outcault Advertising Co., 508 S. Dearborn St., Chicago, Ill.

"Order No. —.

Date Oct. 13, 1913.

"Ship us at our expense as per samples shown your Drug Store Boy 'Ad' Service, to cover a period of one year, beginning Jan. 1st, 1914. This service to consist of 52 Drug Store Boy Cuts, 1 font type. Brooks & Steelhammer. We (or I) agree to pay you net cash monthly, at the rate of 2.10 per week, for one year, we, (or I) to have exclusive right to use the above Drug Store Boy 'Ad' service in our city only, and to hold type and cuts subject to your order when this contract expires. Failure to pay any installment when due renders full amount of this contract due. This contract cannot be canceled. Ship all at one time if possible.

"BROOKS & STEELHAMMER."

—that the plaintiff accepted this order October 17, 1913, and on the 24th of that month delivered the goods to a common carrier selected by the plaintiff, consigned to the defendants at their place of business at Silverton, Oregon, but that before the goods arrived, they notified plaintiff that they would not receive them, and that they had canceled and countermanded the order. It is agreed that upon the arrival of the chattels at Silverton the defendants refused to pay the freight, or have anything to do with them.

As contended by the defendants, one of the things contemplated by the contract was a bailment of the plaintiff's property by which the defendants were to use it for a period, and then hold it subject to the plaintiff's order. This, however, does not change the analogous principle governing a contract for the outright sale of the goods to the effect that the agreement becomes executed as to the seller when he has fulfilled all its conditions incumbent upon him. In the present juncture the proposition was to vest in the defendants a qualified property in the chattels mentioned. The contract was complete when the order of the defendants to that effect was accepted by the plaintiff. It was binding at that time on both parties. As shown in the former opinion, it became an executed agreement on the part of the plaintiff when it delivered the goods to a common carrier consigned to the defendants. Nothing more remained for the plaintiff to do. It had complied with every feature of its contract. It is not apropos to say that because the defendants refused to receive the goods no bailment was created, and hence the contract was yet executory, with the result that the defendants had a right to rescind the same subject to an amercement in damages at the suit of the plaintiff. By the same token the defendants could say that the contract was yet executory at any time when they refused to pay a prescribed installment of the price, although they may have used the type and cuts. The agreement having been fully executed by the plaintiff, it remained for the defendants to carry out their part, and they cannot say that their default in performance, including the acceptance of the goods, made the contract still executory as to the plaintiff, with the attendant right of the defendants to rescind, subject to damages. It is true no bailment ensued,

but the plaintiff did everything it could to bring about that result, and so put the contract past the executory stage. A case very much like the one in hand is *Ware Bros. Co. v. Cortland Cart & Carriage Co.*, 192 N. Y. 439 (85 N. E. 666, 127 Am. St. Rep. 914, 22 L. B. A. (N. S.) 272), which decides that:

“The damages for revocation of a contract to permit an advertisement to run in a periodical for a year is *prima facie* the contract price for the service.”

In short, the defendants directed the plaintiff to ship the goods, and promised to pay. The plaintiff did ship the goods. The conclusion is that the defendants must pay as they stipulated. We adhere to the former opinion.

REVERSED. OPINION APPROVED ON REHEARING.

Submitted on brief December 28, 1916.

Writ allowed in part and dismissed in part, January 5, 1917.

SCHOOL DIST. No. 24 v. SMITH.

(161 Pac. 706.)

Schools and School Districts—High Schools—“Expended.”

1. Under Laws of 1915, Chapter 235, page 330, Section 4, providing that the cost of educating a high school pupil shall be determined by dividing the total amount expended by the high school district for maintaining high schools during any school year by the average daily attendance, etc., as “expended” means “paid out,” an estimate for a high school district, submitted to the county school superintendent as required by Section 2, properly included an item for repairs, but not items for depreciation of a school building or interest on money expended in construction of the building.

Original proceeding in Supreme Court.

In Banc. Statement by MR. JUSTICE McBRIDE.

This is an original proceeding in *mandamus* by School District No. 24 of Marion County, against W.

M. Smith, county school superintendent to compel the defendant to audit and allow certain items claimed by petitioner as part of the cost of educating nonresident high school pupils. The statute to be construed is Chapter 235, page 330, Laws of 1915. Those sections bearing upon the matter here in controversy are, in substance, as follows: Section 1 provides for a special tax levy annually by the County Court of each county for the purpose of defraying the cost of educating high school pupils residing in any county in which there is no county high school, and not in a high school district, the tax to be levied at the same time as taxes are levied for county purposes upon all the taxable property in the county not situated in any high school district. Section 2 requires the school clerk of each high school district, at the close of the school year, to make out under oath, and deliver to the county school superintendent of each county in which any part of his high school district is situated, a full and complete report of the high schools of his district for the entire year. Such report is required to show the total number of high school pupils enrolled during the year, the average daily attendance, the number of teachers regularly employed, the course of instruction pursued, the text-books used, the total number of new high school pupils enrolled during the year, the total cost of maintaining the high school or high schools during the year, the cost of educating each high school pupil during the year, the name, postoffice address and elementary school district residence of each new pupil attending high school in his district and residing in territory not embraced in any high school district, and the total number of such new pupils, and such other information as may be required by the superintendent of public instruction or the county school su-

perintendent. Section 4 imposes the duty upon every county school superintendent to whom this report is made to verify such report and to compile a report showing the total number of such high school pupils residing in his county outside of any high school district, the cost of educating each of such pupils, the total cost of all such pupils, and the total cost of each high school district for all of such pupils attending therein. The same section further specifies that the cost of educating each high school pupil of any high school district shall be determined by dividing the total amount expended by the high school district for maintaining high schools during any school year by the average daily attendance of pupils enrolled in the high school or high schools of the district for the same year. Section 5, among other things, prescribes that not later than December 1st of each year the county superintendent of each county in which there is any county high school shall certify to the County Court of his county the total cost for the preceding year of educating all the high school pupils residing in his county and not in any high school district, and the estimated amount needed for that purpose for the current year. Section 6 requires the County Court of each county, with whom a county school superintendent's certificate is filed at the time of making the tax levy for the year for school purposes, to levy a special tax upon all taxable property in the county not situated in any high school district sufficient in amount to defray the cost for the current year of education of high school pupils residing in such county and not in any high school district. Section 7 directs the county school superintendent of each county on the first Monday of October of each year, and at such other times as he may deem it advisable, to apportion the high

school's tuition fund in the county treasury to the several high school districts, and to draw an order on the county treasurer against the high school tuition fund for the portion that the high school district is entitled to receive. The County Court of Marion County, in anticipation of the requirements of this act, provided a high school fund in the levy made in the spring of 1916, and such fund is now in the county treasury. Petitioner's clerk in his report included the following items as the cost of maintaining high schools during the school year ending June 19, 1916, in this district: (a) Salaries, including the salaries of the principal and teachers in the high school, and one third of the salary of the city superintendent, if one is employed, \$40,163.82; (b) salary of janitor, \$1,550.40; (c) supplies, including crayon, erasers, brooms, brushes, ink, and all supplies that are used for maintenance which are not likely to be of service after a period of two years, \$1,564.57; (d) fuel, \$720.54; (e) light, \$171.89; (f) power, \$411.76; (g) telephone, \$72.23; (h) water, \$242.28; repairs \$1,529.84; (i) printing, \$141.80; depreciation for year 4 per cent, \$4,204.36; (j) insurance, \$198.31; interest on investment 5 per cent, \$6,790.45; (k) stationery, \$256.51—making the total cost for the year \$58,018.76; and from his report he ascertained the cost of educating each high school pupil to be \$71.13. This report was submitted to the defendant as county school superintendent. He refused to audit or allow the items of repair, \$1,529.84, depreciation for year 4 per cent, \$4,204.36, and interest on investment at the rate of 5 per cent, \$6,790.45, making a total of \$12,524.65, deducting which items from the clerk's report of cost reduced the cost of educating each high school pupil to the sum of \$56.12, and the defendant offered to draw his warrant in favor of the petitioner

for that amount per student, aggregating the sum of \$5,956.58; the amount claimed by petitioner at the rate of \$71.13 per pupil aggregating the sum of \$7,550.36 and making a difference of \$1,593.78. If petitioner's contention is correct, it should receive a warrant for \$7,550.36. If a portion of the items rejected should be allowed and a portion eliminated, the amount should be decreased in proportion to the amounts disallowed. No question was made as to the correctness, but only to the propriety of the allowance of the items as being a part of the cost of maintenance.

Submitted on brief under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

WRIT ALLOWED IN PART AND DISMISSED IN PART.

For petitioner there was a brief over the name of *Mr. George G. Bingham*.

For defendant there was a brief over the name of *Mr. Ernest R. Ringo*, District Attorney.

MR. JUSTICE McBRIDE delivered the opinion of the court.

That part of Section 4 which prescribes the method to be pursued by the county school superintendent in determining the cost of educating each nonresident high school pupil is complete in itself, and its meaning is, in our opinion, perfectly clear. The whole process is a simple problem in long division. The dividend is the total amount expended by the high school department of the district for the preceding year, the divisor the average daily attendance, and the resulting quotient the cost of educating the nonresident pupil. The word "expended" means "paid out; disbursed": *People v. Kane*, 43 App. Div. 472, 61 N. Y.

Supp. 195, 198; *State v. Manchester & Lawrence R.*, 70 N. H. 421, 48 Atl. 1103; *L. H. Kurtz Co. v. Polk County*, 136 Iowa, 419, 109 N. W. 612. Depreciation of the building is not money expended. Neither can interest on the amount previously invested in constructing the building be properly termed an "amount expended" during the preceding year; and the county school superintendent ruled correctly in rejecting these items. The item for repairs should have been included in the estimate, and a decree will be entered accordingly. Neither party will recover costs.

WRIT ALLOWED IN PART AND DISMISSED IN PART.

Motion to dismiss appeal denied September 19, 1916.

Argued on the merits November 20, affirmed November 23, 1916, rehearing denied January 9, 1917.

HEWEY v. ANDREWS.

(159 Pac. 1149; 161 Pac. 108.)

Appeal and Error—Time to Appeal—Computation.

1. Where defendant moved for judgment *non obstante veredicto*, such motion would not ordinarily suspend the running of the limitation for appeal, in view of Section 201, L. O. L., requiring judgment in conformity with the verdict to be entered on the day of the verdict; but, where the original judgment was modified by dismissal as to one defendant, the appeal time for another defendant runs from the second judgment, and appeal within 60 days thereof is in time.

Time—Computation—Sunday.

2. Where the last day for perfecting appeal fell on Sunday, notice was properly filed the next day, under Section 531, L. O. L., as to computation of time.

[As to computation of time for performing act when last day falls on Sunday, see note in Ann. Cas. 1914B, 1036.]

Action—Parties Jointly Liable—Default.

3. Where the complaint alleged a joint liability of all defendants, the court may proceed to trial as to those who have answered and joined issue without first entering default and judgment against others who had been served but did not appear, for the old technicality with respect to joint actions has been relaxed, and, though a

joint liability is averred, recovery may be had on proof of a several liability.

Husband and Wife—Contracts—Signing of Wife's Name.

4. Where a husband without authority signed his wife's name to an agreement to pay brokerage fees, the wife is not liable for such fees.

Frauds, Statute of—Jury Question.

5. In an action for brokerage fees, where a written agreement by the owner to pay brokerage fees was supplemented by telegrams and a letter, *held*, that under the evidence it was a question for the jury whether there was a sufficient memorandum within the statute of frauds (Section 808, L. O. L.), declaring that an agreement authorizing or employing a broker to sell real estate for compensation or commission shall not be effective unless in writing.

Appeal and Error—Review—Harmless Error.

6. Error in instructing the jury that they might find against a particular defendant is cured by subsequent vacation of judgment and dismissal of the action against him.

Appeal and Error—Objections—Sufficiency.

7. In an action by a broker for commissions, objection to the admission of parol evidence, on the ground that no parol evidence was admissible to establish any of the issues in the case because of the statute of frauds (Section 808, L. O. L.), is insufficient to raise the question whether particular parol evidence was admissible, for parol evidence was, of course, admissible to establish some of the issues in the case, such as whether a sale was effected, etc., though the employment could not be established in that manner.

From Wasco: WILLIAM L. BRADSHAW, Judge.

This is an action by Sam Hewey against C. S. Andrews and Lillie M. Andrews and others. Judgment was rendered in favor of plaintiff against C. S. and Lillie M. Andrews after which it was modified to run against C. S. Andrews only, and he appealed. Plaintiff-respondent moves to dismiss the appeal.

MOTION DENIED.

Mr. William H. Wilson, for the motion.

Mr. Ralph R. Duniway, contra.

In Banc. Opinion by MR. CHIEF JUSTICE MOORE.

This was an action by S. Hewey against C. S. Andrews, Lillie M. Andrews, Clarence L. Look and

Ethelda M. Look, to recover the balance of an alleged commission for services rendered by the plaintiff in effectuating the sale of land. The cause was tried and a verdict of \$1,727.50 returned February 16, 1916, against C. S. Andrews and Lillie M. Andrews, whose counsel, invoking the rule established in *Fisk v. Henarie*, 14 Or. 29 (13 Pac. 193), *Wilson v. Blakeslee*, 16 Or. 43 (16 Pac. 872), *Thomas v. Barnes*, 34 Or. 416 (56 Pac. 73), and *North Pacific Lumber Co. v. Spore*, 44 Or. 462 (75 Pac. 890), moved for a judgment dismissing the action notwithstanding the verdict, on the ground that the obligation sued on was joint, and that as the trial was had and the verdict returned as to only two of the defendants, no valid judgment could be predicated thereon. This motion was denied March 1, 1916, by a judgment, a part of which reads:

“Thereupon it is hereby ordered that the judgment heretofore given and made in this court and cause on the sixteenth day of February, 1916, be and the same is hereby set aside, vacated, and held for naught as to the defendant Lillie M. Andrews, but the same is continued in full force and effect as to the defendant C. S. Andrews, and that this cause be, and the same is hereby, dismissed as to the defendants Lillie M. Andrews, Clarence L. Look, and Ethelda M. Look, and that the defendant Lillie M. Andrews have and recover of and from the plaintiff her costs and disbursements in this action to be taxed.”

1. In order to review the latter determination C. S. Andrews, on April 29, 1916, served a notice of appeal, and filed it May 1st following. The plaintiff's counsel move to dismiss the appeal on the ground that it was not taken within the 60 days limited therefor. The statute regulating the recording of final determinations by a Circuit Court reads:

“If the trial be by jury, judgment shall be given by the court in conformity with the verdict and so entered

by the clerk within the day on which the verdict is returned": Section 201, L. O. L.

Under the provisions of this enactment a motion to set aside a verdict and for a new trial will not ordinarily suspend the running of the statute of limitations as to the time limited for taking an appeal: *Barde v. Wilson*, 54 Or. 68 (102 Pac. 301); *Oldland v. Oregon Coal & Nav. Co.*, 55 Or. 340 (99 Pac. 423, 102 Pac. 596); *Colgan v. Farmers & Mechanics' Bank*, 59 Or. 469 (106 Pac. 1134, 114 Pac. 460, 117 Pac. 807); *Macartney v. Shipherd*, 60 Or. 133 (117 Pac. 814, Ann. Cas. 1913D, 1257); *Gearin v. Portland Ry., L. & P. Co.*, 62 Or. 162 (124 Pac. 256); *Hahn v. Astoria National Bank*, 63 Or. 1 (114 Pac. 1134, 125 Pac. 284); *De Lore v. Smith*, 67 Or. 304 (132 Pac. 521, 136 Pac. 13, 49 L. A. R. (N. S.) 555); *Skelton v. Newberg*, 76 Or. 126, 136 (148 Pac. 53). Where, however, the original judgment is modified by a subsequent order, the date of the latter judgment is the time from which the limitation for taking the appeal should begin to run. In this instance the judgment was not altered as to C. S. Andrews, but if he were dissatisfied with the dismissal of the action as to Lillie M. Andrews, he would have been obliged to appeal from that determination, notwithstanding he may have taken an appeal from the original judgment. This procedure, if sanctioned, would necessitate two appeals by the same party when a single review of the final judgment by him ought to be sufficient, in which appeal the intermediate order could be reviewed: Section 558, L. O. L. We conclude, therefore, that the original judgment, having been set aside in part, was in effect vacated in all particulars, and that the modified judgment, by referring to the preceding determination, incorporated therein the original judgment as to C. S. Andrews,

thus making the latter judgment final, and the one from which this appeal was properly taken.

2. By the statutory method of computing time the last day thus limited for perfecting the appeal was April 30, 1916; but, as that day was Sunday, the notice was properly filed the next day: Section 531, L. O. L.

The motion to dismiss the appeal is denied.

MOTION DENIED.

Affirmed November 23, 1916, rehearing denied January 9, 1917.

ON THE MERITS.

(161 Pac. 103.)

Department 1. Statement by MR. JUSTICE BENSON.

This is an action to recover an unpaid balance of a commission alleged to have been earned by plaintiff as a real estate broker. It is averred in the complaint that in January, 1915, the defendants employed plaintiff to procure a purchaser for a tract of land therein described; that he was to have as compensation therefor one half of all that defendants might receive for such property in excess of \$20,000; that plaintiff did find a purchaser at a price exceeding \$26,000; that he afterward agreed to accept \$3,000 in full for his commission, and defendants agreed in writing to pay the same; that defendants have paid thereon the sum of \$1,272.50, and there remains unpaid \$1,727.50; that demand has been made for payment thereof, which has been refused. Then follows a prayer for judgment.

The defendants C. S. Andrews and Lillie M. Andrews answered separately with general denials. The defendants Clarence L. Look and Ethelda M. Look

were personally served with summons but made no appearance. When the cause was called for trial, the answering defendants objected to proceeding further until default and judgment should be entered against the defendants C. L. and Ethelda M. Look. The objection being overruled, a trial was had resulting in a verdict against both the answering defendants in the sum of \$1,727.50, and on the same day these defendants filed separate motions for judgment on the verdict dismissing the suit. On February 29th, a judgment was entered in accordance with the verdict in favor of plaintiff. When the plaintiff rested, the defendant C. S. Andrews moved the court for a nonsuit, and for a directed verdict in his favor, on the ground that the plaintiff had not introduced testimony supporting, or tending to support, the allegations of his complaint, and that the testimony introduced is in violation of the provisions of the statute of frauds, which motions were overruled by the court, and the defendants did not offer any evidence upon the trial. On February 29th, the court entered a judgment in favor of plaintiff in accordance with the verdict and, having taken under advisement the motions of the defendants for a judgment dismissing the suit, on March 1st, made and entered the following final judgment order:

“Now on this day the court having considered the motion of the defendants C. S. Andrews and Lillie M. Andrews for a judgment against the verdict dismissing the action and for a judgment against the plaintiff for their costs and disbursements incurred herein upon the ground that this is an action upon an alleged joint liability of all the defendants, and the trial being against a portion of the defendants only, there can be no judgment against separate defendants, and the court being fully advised as to said motion.

"It is ordered that said motion be and the same is in all things denied upon the grounds mentioned and set forth in said motion, but it appearing to the court from all the evidence in said cause that there was no joint obligation on the part of any of the defendants to pay the commission claimed in the plaintiff's complaint and no contract or obligation within the provisions and requirements of Section 808, Lord's Oregon Laws, as to the defendants Clarence L. Look, Ethelda M. Look, and Lillie M. Andrews, and that no cause of action has been proved against said defendants or any of them, and that the evidence offered at the trial of said cause tended to show and did show a separate agreement by the defendant C. S. Andrews alone.

"Thereupon it is hereby ordered that the judgment heretofore given and made in this court and cause on the 16th day of February, 1916, be and the same is hereby set aside, vacated, and held for naught as to the defendant Lillie M. Andrews, but the same is continued in full force and effect as to the defendant C. S. Andrews, and that this cause be and the same is hereby dismissed as to the defendants Lillie M. Andrews, Clarence L. Look, and Ethelda M. Look, and that the defendant Lillie M. Andrews have and recover of and from the plaintiff her costs and disbursements in this action to be taxed."

The defendant C. S. Andrews appeals.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. Ralph R. Duniway*.

For respondent there was a brief and an oral argument by *Mr. William H. Wilson*.

MR. JUSTICE BENSON delivered the opinion of the court.

3. There are several assignments of error, but they only involve two serious questions for the considera-

tion of this court: (1) Does the fact that the complaint alleges a joint liability of all the defendants preclude the court from proceeding to trial as to those who have answered and joined issue, without first entering default and judgment against others who have been regularly served with summons but have not made any appearance? (2) Is there sufficient competent evidence disclosed by the record to justify a submission of the case to the jury for their consideration?

In *Wilson v. Blakeslee*, 16 Or. 43 (16 Pac. 872), this court distinctly holds that it is error to enter a default and judgment against part of the defendants in an action upon a joint obligation before the trial of the action upon the issues raised by the answering defendants. In the case of *Dairy Assn. v. Schermerhorn*, 31 Or. 308 (51 Pac. 438), Mr. Justice WOLVERTON, speaking for the court, says:

“The idea formerly obtained that a joint obligation or contract constituted as indivisible demand. The several individuals jointly contracting were considered as a single entity, and, to describe that entity, it was necessary to name the identical individuals bound. A description which omitted any that were bound, or included others not bound, would not identify the entity. Hence it was requisite that all the individuals composing it should be charged, and no more; otherwise, the contract sued on would not be the one made. So, it was considered that an amendment which omitted a party formerly charged jointly with another was a statement of a new and distinct cause of action. Modern code practice, however, has materially encroached upon this idea, and a nonjoinder or misjoinder of parties defendant does not necessarily nonsuit the plaintiff or defeat the action. It is provided by statute that when an action is against two or more defendants, and ‘all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judg-

ment against such defendant, or defendants, if the action had been against them, or either of them alone': Hill's Ann. Laws, § 60, subd. 3. Furthermore, 'judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants'; and, 'in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others': Hill's Ann. Laws, §§ 244, 245. A statute identical in effect with these sections has received judicial construction in New York, and it is there held that: 'A plaintiff is not now to be nonsuited because he has brought too many parties into court. If he could recover against any of the defendants upon the facts proved had he sued them alone, the recovery against them is proper, although he may have joined others with them in the action against whom no liability is shown': *McIntosh v. Ensign*, 28 N. Y. 169, 172. And, under a statute of similar import more recently enacted, and which it was declared should receive the same construction as the former, ANDREWS, J., says: 'The common-law rule that, in an action against several defendants upon an alleged joint contract, the plaintiff must fail unless he establishes the joint liability of all the defendants, is no longer the rule of procedure in this state. By the former Code (Section 274), the court was authorized in an action against several defendants to render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment was proper. The court, in construing this provision, did not limit its application to cases of joint and several liability, but considered it as authorizing a separate judgment where a separate liability of some of the defendants was established on the trial, although the cause of action, as alleged in the complaint, was joint only': *Stedeker v. Bernard*, 102 N. Y. 327, 330 (6 N. E. 791).

"From these authorities the true and reasonable construction of the several sections of our statute alluded to would appear to be that when, in an action upon a joint contract, it is determined that one or

more of the defendants are not liable, but that one or more of the others are, judgment may be given and rendered against those liable, whether their liability be joint or several, and the other defendants may be dismissed."

4, 5. Let us now examine the evidence presented upon the trial and apply the law as above quoted to the established facts. On June 15, 1914, defendant C. S. Andrews listed his farm of 1,280 acres in Wasco County with the firm of Hartman & Thompson of Portland, Oregon, for sale, signing and leaving with them a written memorandum containing the following terms:

"Messrs. Hartman & Thompson, Portland.

"In consideration of the benefit I expect to derive from the sale of the property below described, and of securing an interest and effort on your part and at your expense, to obtain for me the sum below mentioned for said property, I hereby agree to sell and convey by a good and sufficient grant and deed of conveyance, and give the usual covenants therein, to you or your assigns, at any time within the next two mos (or thereafter, until I give you ten days' notice to the contrary in writing), the following described property, viz.: Situate in 15 E. 1 S. See abstract. County of Wasco, State of Oregon, with the appurtenances as described below for the sum of — dollars (\$44,800) to be paid as follows: You being at liberty to take or sell the same on said terms. In case a sale or exchange of said property is effected, I agree to pay you a commission of 2¼ per cent on the \$44,800 above stated or a lesser sum in case I agree to sell for less, and after a deposit is taken, I will allow fifteen (15) days to search title.

"[Signed] C. S. ANDREWS (owner).

"L. M. ANDREWS (his wife).

"Subscribing witnesses (who listed this): Sam Hewey, Tabor 3248."

Thereafter, some months elapsed without a sale being effected, and then C. S. Andrews had a conversation with plaintiff in which he agreed that if he should find a buyer for the farm he would give him an additional commission of one half of all he should obtain for the property in excess of \$20,000, and on January 5, 1915, plaintiff wired to C. S. Andrews, who was then in Los Angeles, as follows:

"Have prospective buyer for your Wasco County ranch will you confirm your offer to give me one half of all over twenty thousand dollars that I can get for this ranch cash payment buyer to assume mortgages this does not include stock implements and Clarence's lease on Kelly place wire answer care Stelwyn apartment number forty eight cor. St Clair and Washington.

"SAM HEWEY."

On January 6th, Andrews replied:

"I will give you one half of all over twenty thousand dollars that you can get me for my ranch buyer assuming mortgages this does not include stock implements or Clarence's lease on Kelly place Letter follows."

The letter reads thus:

"January 6, 1915.

"Mr. Sam Hewey, Stelwyn Apt. No. 48.

"Portland, Oregon.

"My dear Mr. Hewey:

"Your night telegram 'Have prospective buyer for your Wasco County ranch. Will you confirm your offer to give me one half of all over twenty thousand dollars that I can get for this ranch cash payment buyer to assume mortgages. This does not include stock implements and Clarence's lease on Kelly place. Wire answer care Stelwyn Apartment #48 Cor. St. Clair & Washington. Sam Hewey'

"Sure thing! Mr. Hewey, yes, and I hope you make five thousand out of it and it is a grand good cheap buy at that figure. 'For exchange—or sale—1,280

acres, Oregon, wheat and stock farm, fully equipped, horses, hogs, poultry. Bank appraised value \$40,461. Andrews, the Angelus Hotel.' I have been running this add here for a month and have had over 100 answers now. There are two parties that mean business and have good propositions and they look good to me. Now if your client means business you better hurry so I can shut off these two good prospects I have here. Should you not wire me again this week I will try to close with one of these two and will wire you again that I am bringing my customer up to see the 1,280. In other words the party closing first is the best man and he gets the farm. Now I wish you all kinds of luck and hope you make over \$5,000.

"Yours very truly,

"C. S. ANDREWS."

On January 7th, plaintiff wired Andrews as follows:

"Your telegram received. I sold your ranch including stock implements, and Clarence lease on Kelly place. Price above twenty-five thousand. Have two hundred fifty dollar deposit. Twenty-five hundred to be paid in twenty days, Seventy-two hundred fifty in thirty days. Buyer to assume sixteen thousand one hundred twenty-five mortgages. You to square up with Kelly—Wire when can come, meet me at Stelwyn Apts.

"SAM HEWEY."

On January 8th the following reply was received:

"Allow me to congratulate you on the sale of wheat farm will meet you at Stelwyn Apartment number forty eight cor. St. Clair and Washington at nine on Monday.

"C. S. ANDREWS."

When the first memorandum above set out was delivered to Hewey, there was also delivered an abstract containing a detailed description of the land to be sold. The property was sold by Hewey to H. L. Price for a consideration of something more than \$29,000. It

will be noted that the agreed commission on this amount would be considerably more than the sum prayed for in the complaint, but the evidence discloses that after the sale was consummated the plaintiff agreed to take a less amount and Andrews wrote out, signed and delivered to plaintiff the following instrument:

"I hereby agree to pay Sam Hewey three thousand ten and 50/100 dollars as extra commission above the regular 2½ per cent on the \$29,580. Sale of my wheat ranch. Regular commission amounts to \$739.50. C. S. Andrews, Jan. 11, 1915."

The plaintiff admits having received \$1,272.50, leaving a balance of \$1,727.50 still unpaid. The evidence also discloses the fact that the name of L. M. Andrews was signed to the Hartman & Thompson memorandum by C. S. Andrews, and it is not disclosed that he had any authority to act for her. It therefore clearly appears that plaintiff failed to establish any joint liability, and therefore, under the authorities above cited, it was not error for the court in its final judgment to dismiss the action as to all of the defendants except C. S. Andrews. It is contended by defendant that there is no competent evidence in the record satisfying the statute of frauds (Section 808, L. O. L.); but the writings set out herein when read together, as they should be, afford abundant competent evidence to go to the jury upon the question of a sufficient written memorandum under the statute of frauds.

6. It is true that the court erred in instructing the jury that they might find against the defendant Lillie M. Andrews, for there is absolutely no evidence in the record connecting her with the agreement made by her husband; but this error was obviated by the subsequent conduct of the court in vacating the judgment and dismissing the action as to her.

7. There is some discussion in the briefs of the admissibility of certain parol evidence, but the only objection made to the admission thereof, as disclosed by the bill of exceptions and the assignment of errors, was a general protest upon the expressed ground that no parol evidence whatever is admissible to establish any of the issues in the case because of the provisions of Section 808, L. O. L. However, this contention is untenable for the reason that the statute referred to prohibits only the admission of parol evidence for the purpose of proving the terms of the agreement itself, and parol evidence is still admissible for the purpose of showing, for example, the fact that a purchaser was found, that a sale was effected, that a part of the agreed commission has been paid, and that there is an unpaid balance. The objection and exception are therefore unavailing.

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE BURNETT and MR. JUSTICE McBRIDE
CONCUR.

Argued October 30, affirmed November 21, 1916.
Rehearing denied January 9, 1917.

RAINEY v. RUDD.*

(160 Pac. 1168.)

Wills—Liability of Legatees—Debt of Decedent—What Law Governs.

1. Where a note was payable in Colorado and the will of the maker, whereby defendants became residuary legatees, was probated in that state, the payee's right of action, if any, to subject property in the hands of the legatees to the payment of the note arose in Colorado, and was governed by its law.

*For authorities on the question of liability of heirs or legatees for obligations of ancestor, see note in 21 L. R. A. 89. **REPORTER.**

Wills—Liability of Legatee—Common Law.

2. At common law, no action can be maintained against a legatee upon a contract made by the decedent, as the legatee takes the property only after it has passed from the administrator or executor, in whose hands alone it is liable for the debts of the decedent.

Descent and Distribution—Wills—Liability of Heir.

3. The liability of an heir and devisee is confined to the real estate, with which the administrator or executor has nothing to do.

Evidence—Judicial Notice—Statutes of Another State.

4. The Supreme Court will not take judicial notice of the statutes of another state.

[As to admissibility of printed copy of statutes to prove law of another jurisdiction, see note in *Ann. Cas.* 1916D, 853.]

Evidence—Presumption—Statutes of Another State.

5. Where the statutes of another state are not pleaded, it will be presumed that upon the questions involved the common law prevails.

Wills—Liability of Legatee—Action on Note—Complaint.

6. Under Section 488, L. O. L., making legatees liable to a suit in equity by a creditor of the testator to recover the value of any legacy received by them, and providing plaintiff shall not recover unless he shows that no assets were delivered by the executor or administrator to the next of kin, that the value of such assets has been recovered by some other creditor, or that such assets are not sufficient to satisfy his demand, the complaint, in an action on a note against the legatees under the will of the maker, silent as to the statutory prerequisites, was demurrable.

From Wallowa: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is a suit by Roy Rainey and Iva Rainey against Jessie S. Rudd and Arthur H. Rudd, wherein it is sought to subject property in the hands of residuary legatees to the payment of a promissory note of the testator. The allegations of the complaint disclose substantially the following facts: That on March 14, 1904, Wm. M. B. Sarell executed and delivered to Anna E. Rainey, then residing in Florida, a promissory note for \$750, payable at the office of John Hipp in Denver, Colorado, one year after the death of the maker; that on August 13, 1905, Anna E. Rainey died in Florida, leaving a will whereby plaintiffs, as resid-

uary legatees, became the owners and holders of the note; that Sarell, the maker of the note, died in Colorado on May 21, 1908, leaving a will, whereby the defendants became residuary legatees, and received from the estate property of the value of about \$3,000. All of the parties to the suit are now residents of Oregon. Plaintiffs did not learn of Sarell's death until after the final settlement of his estate, and therefore failed to present their claim to the executor, and now bring this proceeding.

A demurrer to the complaint having been sustained, plaintiffs declined to plead over, a decree was entered dismissing the suit, and plaintiffs appeal.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief and an oral argument by *Mr. Thomas M. Dill*.

For respondents there was a brief and an oral argument by *Mr. A. S. Cooley*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. In the complaint it appears affirmatively that the defendants received whatever property they derived from the Sarell estate as legatees and not otherwise. It is contended by counsel for defendants that the complaint is fatally defective, in that it fails to plead any statute of the State of Colorado, giving a right of action against legatees for the debts of a testator. The note upon which this suit is predicated was payable at the office of John Hipp in Denver, Colorado, and the will of the maker thereof was probated in the same state. Therefore the right of action, if any exist, arose in Colorado and "the law of the place where the

right was acquired or the liability incurred will govern as to the right of action": *Bergman v. Inman*, 43 Or. 456 (72 Pac. 1086, 73 Pac. 341, 99 Am. St. Rep. 771).

2, 3. At common law, no action can be maintained against a legatee upon a contract made by the decedent. The liability of the heir and devisee is confined to the real estate descended, with which the administrator or executor has nothing to do, while the next of kin and legatee take the property only after it has passed from the administrator or executor, in whose hands alone, under the common law, it is liable for the debts of the deceased: 14 Cyc. 207; 2 Woerner, *Am. Law of Adm.* (2 ed.), § 574. We must therefore look to the statutes for the right to follow assets into the hands of a legatee for the debts of a testator.

4, 5. No statute of Colorado, where the right of action, if any arose, is pleaded which permits the suit to be prosecuted, and it has been held by this court that it will not take judicial notice of the statutes of another state, and, if they are not pleaded, it will be presumed that upon the questions involved the common law prevails.

6. Even if it could be held that the right of action arose in this state, the complaint is equally insufficient, for the statute contains the following provisions:

"Legatees are liable to a suit in equity by a creditor of the testator to recover the value of any legacy received by them. The suit may be maintained against all the legatees jointly, or against any one or more of them severally. In such suit the plaintiff shall not recover unless he shows:

"1. That no assets were delivered by the executor or administrator * * * to his next of kin; or,

"2. That the value of such assets has been recovered by some other creditor; or,

"3. That such assets are not sufficient to satisfy the demand of the plaintiff": Section 488, L. O. L.

The complaint is silent as to each of these prerequisites. It follows that no error was committed in sustaining the demurrer, and the decree is affirmed.

AFFIRMED. REHEARING DENIED.

Motion to dismiss appeal allowed December 19, 1916,
Rehearing denied January 9, 1917.

PORTLAND v. SCHMID.

(161 Pac. 560.)

Eminent Domain—Appeal and Review—Waiver of Appeal.

1. A municipality, in condemnation proceedings to secure property for sidewalk purposes, waives its appeal from judgment fixing damages by taking and using the property pending the appeal.

Eminent Domain—Appeal and Review—Waiver of Appeal.

2. An appeal by a municipality from judgment in condemnation proceedings fixing damages for sidewalk property will be held waived where the city constructed the sidewalk pending appeal, notwithstanding that thereafter, on advice of the city attorney, sidewalk was removed by city.

[As to appealable orders and judgments in eminent domain proceedings, see note in *Ann. Cas.* 1915D, 548.]

From Multnomah: **CALVIN U. GANTENBEIN**, Judge.

This is a condemnation proceeding by the City of Portland against Charles Schmid and others. From a judgment in favor of defendants plaintiff appeals. Respondents move to dismiss appeal. Motion allowed and appeal dismissed.

DISMISSED. REHEARING DENIED.

In support of the motion there was a brief over the names of *Messrs. Griffith, Leiter & Allen, Messrs.*

Latourette & Latourette and Mr. Ralph R. Duniway, with oral arguments by Mr. Harrison Allen and Mr. J. R. Latourette.

Contra, there was a brief over the names of *Mr. Lyman E. Latourette*, Deputy City Attorney, and *Mr. Walter P. La Roche*, City Attorney, with an oral argument by *Mr. Latourette*.

Department 1. **MR. JUSTICE BENSON** delivered the opinion of the court.

1. This was a proceeding by the City of Portland to condemn a portion of lot 1 in block 315 for the purpose of widening Washington Street. Upon a trial the jury returned a verdict in favor of the defendants fixing the amount of damages to be recovered in excess of benefits to be derived from the improvement. A judgment was subsequently entered thereon, from which the plaintiff perfected its appeal. Thereafter the city authorities took possession of the premises, erected a sidewalk thereon, and opened the same to the public for its use. About a month later, at the request of the city attorney, the sidewalk was again set back to the old line, and the defendants now move to dismiss the appeal upon the ground that the plaintiff has forfeited its right of appeal by accepting the fruits of the judgment and entering upon and occupying the premises sought to be condemned. Plaintiff, while admitting that the pavement was laid up to the newly established line and that the sidewalk was constructed upon the premises and used by the public, insists that these acts were inadvertently performed by the city's agents and employees without authority, and that therefore the city ought not to be held to have waived its right of appeal. We do not deem it necessary to enter into any discussion of the evidence as

to this question, and it is enough to say that, in our judgment, the evidence satisfactorily discloses that the city authorized the occupation and use of the land, and that its inadvertence consisted in a failure to hold a timely consultation with its legal advisers.

2. There remains then a consideration of the question as to whether or not the taking and occupation of the land constitutes a waiver of the appeal. It may be said at the outset that it is so well established as to be regarded as elementary law that a litigant cannot accept the benefits of an adjudication and afterward appeal therefrom. Practically every state in the Union has so held, and the doctrine is sustained in this state in *Moore v. Floyd*, 4 Or. 260; *Portland Cons. Co. v. O'Neil*, 24 Or. 54 (32 Pac. 764); *Bush v. Mitchell*, 28 Or. 92 (41 Pac. 155); *Moore v. Moores*, 36 Or. 261 (59 Pac. 327); *Roots v. Boring Junction Lumber Co.*, 50 Or. 298 (92 Pac. 811, 94 Pac. 182); *Oregon Elec. Ry. v. Terwilliger L. Co.*, 51 Or. 107 (93 Pac. 334, 930); *Kellogg v. Smith*, 70 Or. 449 (142 Pac. 330). It is true that the money part of the judgment has not been paid, but the defendants are the only ones who might complain of this. If it had been paid, the authorities are abundant to the effect that such payment would constitute a waiver of the appeal, but it must not be overlooked that the one signal benefit sought by the plaintiff in this litigation was the right to occupy the land in controversy, which it did, and the fact that it subsequently regretted the action and removed the sidewalk could not restore its lost right: *Portland Cons. Co. v. O'Neil*, 24 Or. 54 (32 Pac. 764).

It follows that the appeal must be dismissed.

DISMISSED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE
and MR. JUSTICE BURNETT concur.

Argued November 1, 1916.
Affirmed January 9, 1917.

BOTT v. CAMPBELL.

(161 Pac. 955.)

Reformation of Instruments—Evidence—Sufficiency—Mistake.

1. In a suit to reform a five-year lease of wheat land, one half of which the lessee was to put in crop each year and the other half he was to fallow, evidence *held* to show that it was agreed by the parties that the lessee should receive a reasonable compensation for fallowing during the last summer of the term that portion of the land which he was not to crop that year, and that the provision was omitted from the lease as written by the scrivener, though the terms of the agreement had been stated to him.

[As to causes and proceedings for reformation of instruments, see note in 65 Am. St. Rep. 481.]

Reformation of Instruments—Evidence—Sufficiency—Meeting of Minds.

2. In a suit to reform a lease for mistake, evidence *held* to show that statements by the parties were not mere negotiations leading up to the making of the agreement, but constituted an agreement on which the minds of the parties met, and which by mistake of the scrivener was not set forth in the written lease, so that such statements were admissible under Section 713, L. O. L., excluding parol evidence varying a written instrument, except where a mistake or imperfection of the writing is put in issue by the pleadings.

Reformation of Instruments—Mistake—Degree of Proof.

3. Where one of the parties to a written contract is dead, evidence of a mistake in the contract must be carefully scrutinized, and found to be convincing and to show clearly the contract and the existence of a mutual mistake.

Landlord and Tenant—Construction of Lease—Furnishing Seed.

4. In a written lease of wheat land for five years which provided that one half thereof should be put in crop each year, and the other half left fallow, a provision that the lessee should cultivate and summer-fallow the lands each year, and would summer-fallow it for the last year, the work to be done in a husband-like manner, and would furnish all seed necessary to sow the same, will not be construed to require the lessee to furnish the seed necessary to sow the part left fallow during the last year, from the crop on which he would get no benefit, but only that he would furnish the seed for the crop raised during the five years, of which he was to receive two thirds and the lessor one third.

From Umatilla: GILBERT W. PHELPS, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is a suit by N. K. Bott against Harriet Campbell, Charles Argyle Campbell, Grace Emaline Campbell, Harriet Fitzgerald Campbell and Annie M. Campbell, in which suit the plaintiff seeks to reform a written contract. From a decree in his favor the defendants appeal.

On September 19, 1911, Charles H. Campbell was the owner of 1,120 acres of wheat land in Umatilla County, about 1,000 of which were in cultivation, approximately 500 then in summer-fallow, and about 500 in stubble, from which a crop had been taken in 1911. Plaintiff, N. K. Bott, a young man, purchased of Mr. Campbell the farming outfit, consisting of horses and mules, machinery and implements, paid him \$5 an acre for the work done in summer-fallowing the 500 acres during the season of 1911, aggregating about \$8,600, and on the date first mentioned leased the land for a term of five years and until September 19, 1916. In order to pay for the outfit and summer-fallow plaintiff obtained a loan from his father, J. K. Bott. After there had been some negotiations between plaintiff and Mr. Campbell, and a few days before the transactions were completed, Mr. J. K. Bott, in the interest of his son, went with him to the premises of Mr. Campbell. They were accompanied by Mr. A. L. Grover, a neighbor for whom plaintiff had been working for a few years. Charles A. Campbell, a son of the lessor, was about the place at the time, and his mother was in the house. Mr. J. K. Bott secured some reduction in the price of the personal property, and, as he and Grover state, the terms of the lease were talked over in their presence. Plaintiff asserts that the conditions of the lease as agreed upon were to the effect that plaintiff should cultivate, furnish seed, plant and

raise crops on one half of the wheat land and summer-fallow and cultivate the other half each year, alternating the same, and pay as rental one third of each crop delivered in the sack at the warehouse, and that during the last season, that of 1916, plaintiff should plow or summer-fallow and cultivate the one half of the land not then in crop for which Charles H. Campbell agreed to pay him the customary or going price. Plaintiff further states that on the day the lease was executed, Charles H. Campbell, then a resident of Walla Walla, Washington, and Mr. N. K. Bott, of Helix, Oregon, met in Pendleton; that they went to the office of Mr. Leffingwell, a real estate and insurance man, for the purpose of having the lease drawn, and informed him of the agreement, and particularly that at the expiration of the lease, if the place was left in summer-fallow, Bott was to be paid the customary price of the country for such work; that nothing was said about seed for the crop to be sown in the fall of 1916. The lease, which is in evidence, was written in duplicate by Mr. Leffingwell, read to the parties, and signed by them. Plaintiff deposited his copy in the First National Bank across the street, and Mr. Campbell took his copy with him. Upon being informed that the lease was executed, Mr. J. K. Bott gave Mr. Campbell a check for his son in payment of the personal property and the summer-fallow then on the land. No other memorandum of the farming outfit or payment for the summer-fallow appears to have been made, these matters not being mentioned in the lease. The evidence shows that plaintiff took possession of the personal property and farmed the land as agreed until about the first of the year, 1916, when a dispute arose in regard to the summer-fallowing of the land during the season of 1916 and the furnishing

of seed for a crop to be harvested in 1917 without pay therefor. Plaintiff then examined his lease for the first time since it had been read to him. Charles H. Campbell died in December, 1911. Mr. Leffingwell is now deceased.

In his complaint plaintiff sets forth the agreement as he claims it was made. He further alleges that the scrivener who drew the lease, a copy of which is attached to the complaint, "was told of all of the provisions of said agreement by both parties thereto, but" failed and neglected to correctly specify the full terms thereof, in this, that he failed to insert in the body of the instrument that the plaintiff should receive the reasonable market price for the work performed by him in summer-fallowing the half of the tillable lands during the year 1916, and did inadvertently and erroneously provide in the lease that the plaintiff was to furnish all necessary seed to sow the summer-fallow; that it was thoroughly and mutually agreed between the parties to the lease that plaintiff was to receive such pay for such work, and that he was not to furnish the seed to sow the summer-fallow during the fall of 1916; that the lease was hurriedly read by the scrivener, and neither plaintiff nor Charles H. Campbell noticed that the written lease contained any provisions to the contrary, "but both believed and understood said written lease contained the provisions so agreed upon." Plaintiff alleges that whatever provisions contained therein are contrary to the understanding and agreement so had between him and Charles H. Campbell were inserted therein erroneously, inadvertently, without the knowledge, and contrary to the understanding, of both parties, and contrary to the real agreement of lease and rental made and entered into between them "and without fault or negligence

on the part of either''; that the defendants are contending for a performance according to a literal construction of the exact language used by the scrivener in the lease.

Defendants, who are the heirs of Charles H. Campbell, deceased, deny the allegations of the complaint as to any mistake in writing the agreement.

AFFIRMED.

For appellants there was a brief with oral arguments by *Mr. Alger Fee* and *Mr. James A. Fee*.

For respondent there was a brief over the names of *Mr. Will M. Peterson* and *Messrs. Raley & Raley*, with oral arguments by *Mr. Peterson* and *Mr. J. Roy Raley*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. From a careful reading of the evidence we find, as did the learned trial judge, that the agreement was made between plaintiff and Charles H. Campbell as alleged in plaintiff's complaint; that it was mutually agreed between the parties to the lease that plaintiff should receive a reasonable compensation for the work to be done by him in summer-fallowing that portion of the land which was not in crop during the season of 1916, and that it was not agreed nor understood that he should furnish seed to sow the summer-fallow during the fall of 1916 for the 1917 crop; that by mistake of the scrivener the writing failed to express the contract as made. The terms of the lease were stated to the plaintiff by Mr. Charles H. Campbell when the former was first at his place for the purpose of renting the land and purchasing the personal property. Defendant Charles A. Campbell testified to the effect that he was present during the preliminary negotia-

tions on the front porch and also at the time of the second conversation, when Mr. J. K. Bott and Mr. Grover were there. As to what was said at the second meeting about the lease, he stated:

"The lease was to be made for five years and they were to give one third of the crop in the warehouse; they agreed to the whole substance of it."

To the question: "Was there anything said at that time about the terms of it that you recall?" he answered, "No, sir." He further stated the substance of the conversation about the equipment, and that that was the extent of the conversation there that day; that he was present all the time when Bott was there with his father. On cross-examination he testified in part that a few days before the lease was drawn this conversation was held—

"around the place, part of it in the house and part of it around the machine-shed and barn; they walked around.

"Q. Was there anything said about the general terms of the lease of the farming lands?

"A. No, sir.

"Q. Where was that discussed about the farming lands?

"A. About the terms of the lease, it was discussed a few days before that when Mr. N. K. Bott came down to see about renting the place.

"Q. But on that date what was discussed, or was anything said about the lease that day?

"A. There was nothing said about the lease at all that day.

"Q. Was anything said at all about the farming lands that day when Mr. Grover was there?

"A. No, sir; it was all about the outfit that was talked about that day."

The witness stated that if the summer-fallow was mentioned it was somewhere else; that about a week

before this time, when N. K. Bott was first there, the conditions of the lease (as above stated) were mentioned, and "there was nothing said about the summer-fallow; he bought the summer-fallow at \$5 an acre and that is all there was about it"; that the summer-fallow was on a list with the outfit, 500 acres at \$5 an acre. He continued:

"My father said to him he should leave the ground plowed the last year; that is all there was said. * *

"Q. Was there anything said about whether he was to get any pay for it or not?

"A. No, sir; there was nothing said either way. * * He [plaintiff] said he would plow the land the last year of the lease, the last year he was there.

"Q. Did that mean all the land, he was to plow all the land the last year, or did he say what he meant?

"A. It was not said but it was taken for granted that he would plow the part which was in stubble. * *

"Q. Wasn't it also taken for granted, if there was any summer-fallow left there, a reasonable price was to be paid for it? (Objection by counsel and ruling by the court.)

"Q. Do you know whether that was taken for granted or not from the course of the conversation you heard there?

"A. I thought it was."

Mrs. Harriet Campbell, widow of the lessor, testified to the conversation on the front porch the first time that plaintiff came there to rent the place, and stated: "They didn't come to any definite conclusion the first time about all of the details, but it was afterward," that she did not hear all the conversation between the parties at the second meeting, but that a definite bargain was made the second time the parties were there. The only effect of the evidence of Mrs. Campbell and Charles A. Campbell is that they did not hear the agreement as to the extra work. Mr. C. A.

Campbell thinks he was present all the time during the two conversations. N. K. Bott is corroborated by the positive testimony of J. K. Bott, his father, and of A. L. Grover, a disinterested witness, to the effect that Mr. Charles H. Campbell stated that when he came back he wanted the summer-fallow left on the place, and that he would pay the customary price for such work. The whole proposition appears to have been accepted by plaintiff with that understanding. No one heard anything said about Bott furnishing seed for seeding the land after the lease expired. The lease was drawn by a layman who apparently was unaccustomed to such work and unfamiliar with the usual manner of raising wheat in that locality. The instrument is a novelty in that according to its stipulations:

The lessee "agrees that he will cultivate and summer fallow the said lands each year during the life of this contract, and will summer-fallow the land during the last year of said contract; the work to be done in a good and husbandlike manner, and will furnish all seed necessary to sow the same, and that prior to sowing said lands he will keep the same free and clear from weeds. Said second party agrees to cut, thrash and take care of said crop so grown on said lands, in proper season, and that he will deliver to the said first party, one third of the grain so grown at the warehouse designated by the said first party, free of all expense to the said first party, as soon as the grain is thrashed, said second party to furnish all new sacks for all the grain so grown. * * "

It was well known that no crops could be raised during the time the land was in summer-fallow; therefore the parties proceeded with that understanding. Plaintiff cultivated and raised crops upon about one half of the land, and plowed and summer-fallowed the other half each year for four years, and paid defendants their portion of the crop, which was accepted without

question. Except for the last year of the term when only one half of the land would ordinarily be in crop, the language of this part of the writing is immaterial. The evidence plainly shows that one half of the land was agreed to be summer-fallowed and one half sowed to a crop each year, and that as the lease would practically expire as to that part of the land which was in crop in 1915, during that fall or one year before plaintiff's interest in the other half would cease. Mr. Campbell promised to pay a reasonable price for summer-fallowing that portion during the season of 1916.

2. It is contended on behalf of defendants that the testimony of J. K. Bott and A. L. Grover as to the conditions of the lease stated by Mr. Campbell is incompetent to prove the actual contract; that such statements were mere negotiations leading up to the making of the agreement, which was effected when the lease was signed. However, the testimony leads us to believe that the contract was perfected at the time the parties met on the premises when J. K. Bott and A. L. Grover were there, and they talked over and agreed upon all the details. The only thing remaining was to reduce the agreement to writing. There was a meeting of the minds of the contracting parties. The error in reducing the agreement to writing occurred in the ordinary way, and without the particular fault or negligence of either party. Both appeared to understand that the written memorandum expressed the stipulations made between them.

3. Where one of the contracting parties is deceased, in order to reform a written memorandum of the stipulations executed by them, the evidence should be carefully scrutinized, and found to be convincing and to clearly show the contract as actually made by the parties, and that a mutual mistake has been made in

reducing the agreement to writing, and that the instrument does not express the contract as intended: *Lehigh Coal etc. Co. v. Central R. Co. of N. J.*, 41 N. J. Eq. 167 (3 Atl. 134, 137); *Hawkins v. Doe*, 60 Or. 437, 445 (119 Pac. 754, Ann. Cas. 1914A, 765). The testimony in the present case complies with this rule in a full measure. All agree that the writing in question is erroneous in respects other than as to the portion about which there is a controversy. It was read over to the parties, and no one suspects that it was not correctly read; therefore no negligence can be predicated upon the fact that the plaintiff did not read it himself until about four years afterward.

The language of the instrument is so general that it is not at all strange that it was not understood by the parties. It shows that there was a special agreement in regard to the summer-fallowing to be done during the season of 1916. This was quite a large amount of work, a season's plowing of 500 acres, and the writing, in any event, should have specified at whose expense it was to be done, instead of being left out. As we understand the document, instead of the oral evidence contradicting its terms, it merely supplies a portion of the agreement which was not reduced to writing. The imperfection of the instrument, a part of which is admitted, lessens its evidentiary force and value. The writing is not the contract. It is merely evidence thereof.

It is inconceivable that N. K. Bott, a young man just starting on a business venture of five years' duration, should assent to doing extra plowing and cultivating to the amount of about \$2,500 when he was to get no part of the crop prepared for, without talking the matter over with his prospective landlord. It was perfectly in keeping with the usual business methods that

the matter should be discussed, just as Mr. J. K. Bott and A. L. Grover testify was done. They were both familiar with such farming arrangements, and Mr. Bott, was, no doubt, interested for his son; in fact acted in his behalf in making a part of the deal. The integrity of neither of these two men is questioned. We have no doubt that the contract was made in regard to the compensation for the summer-fallow in 1916, as asserted by plaintiff and these two witnesses, when the evidence is considered in the light of all the attending circumstances, and that by mistake of the scrivener the written lease failed to record the agreement as made, or as the parties thereto intended. In 2 Pom. Eq. Juris., § 859, the general rule is announced as follows:

“It is therefore settled that in the suits, whenever permitted, to reform a written instrument on the ground of a mutual mistake, parol evidence is always admissible to establish the fact of the mistake, and in what it consisted, and to show how the writing should be corrected in order to conform to the agreement which the parties actually made. * * The court may grant relief upon the strength of the verbal evidence alone. * * The authorities all require that the parol evidence of the mistake and of the alleged modification must be most clear and convincing, in the language of some judges, ‘the strongest possible,’ or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of the error.”

In *Smith v. Interior Warehouse Co.*, 51 Or. 578, at page 581 of the opinion (94 Pac. 508, 509, 95 Pac. 499), it is stated:

“There can be no dispute as to the law that equity will entertain jurisdiction to reform a contract on the

ground of mistake; but, to entitle plaintiff to such relief, the mistake must be shown by satisfactory proof, and that it was mutual: *Stein v. Phillips*, 47 Or. 545 (84 Pac. 793)."

When a mistake or imperfection of a written instrument is put in issue by the pleadings, oral evidence of the agreement as actually made is permissible under Section 713, L. O. L., as between the parties or their representatives or successors in interest.

Let us contract the clause in regard to the work during the last year with the following specifications found in the latter part of the lease:

"The party of the first part agrees to furnish at the town of Helix all posts and wire necessary to keep the fences on the premises in a good state of repair; it being understood that the party of the second part is to furnish the labor without expense to the party of the first part."

It is easy to conjecture the reason for such an exact stipulation in relation to an outlay of a very few dollars and a little labor in repairing the fences each year when a matter of plowing and cultivation at an expense of some \$2,500 for a crop to be raised after the lease would expire is couched in a dozen words. The clause in regard to fencing is very common, and it was handy for an amateur to obtain a form for the same, while it was necessary to write the agreement in regard to the work of summer-fallowing as an original, without the assistance of a form.

4. While there is a chance for controversy as to the seed for sowing the land during the fall of 1916, from an examination of the agreement, the substance of which, in so far as it relates to that matter, is set out above, we very much doubt if the stipulation should be so construed as to require the lessee to furnish seed after the expiration of the lease. Taking the docu-

ment by its four corners, it is clear that Bott was to have possession of the land for five years and raise five crops thereon, furnishing seed to sow the same. Looking at the second paragraph quoted above, we find that he agrees to care for and harvest the grain so grown and deliver to the lessor one third thereof. There is just as much room for contention that Bott should have a portion of the crop sown in 1916, and that the lessor should have only one third thereof, as that the lessee should be required to furnish grain to seed the land after his term had expired, for a crop to be raised in 1917 in which he was not to share. It seems to us, rather, that the lease terminates on September 19, 1916, and that the clause, "will furnish all seed necessary to sow the same," means that the lessee should furnish necessary seed for sowing the lands each year during the five years. The evidence clearly shows that such was the agreement. The finding of the trial court amounts to the same thing as the construction we have given the written memorial.

It follows that the decree of the lower court should be affirmed; and it is so ordered. **AFFIRMED.**

Submitted on brief January 8, affirmed January 9, 1917.

MITCHELL v. HOWELL.

(161 Pac. 1199.)

From Multnomah: **GEORGE N. DAVIS**, Judge.

This is an action by **A. E. Mitchell** against **W. G. Howell**, in which plaintiff recovered judgment and defendant appeals. The cause was submitted on brief without argument, under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief over the names of *Mr. Albert M. Smith* and *Mr. John F. Cahalin*.

For respondent there was a brief over the name of *Mr. Eugene Brookings*.

In Banc. Opinion PER CURIAM.

This is an action to recover upon a contract for services. We find no error upon the trial or in the findings, and the judgment is therefore affirmed.

AFFIRMED.

Argued October 5, 1916, affirmed January 9, 1917.

CHRISTIE v. BANDON.

(162 Pac. 248.)

Municipal Corporations—County Roads—Control—Statute.

1. The control of county roads is primarily in the legislative power of the state, and until in plain terms the state has given control thereof to any municipality, the latter cannot assume or exercise authority over them; and, under its act of incorporation, Laws of 1891, page 505, Section 39, by subdivision 14 defining the authority of the board of trustees as to obstructions in streets, by subdivision 28 authorizing it to construct streets, by subdivision 32 authorizing county road supervisors to collect taxes and keep the county roads in repair, etc., by Section 68 authorizing the board of trustees to change the grade and improve any street, and by Section 101 authorizing the laying out of streets, etc., the City of Bandon had no authority to exercise control over a county road.

Dedication—Street—Sufficiency of Evidence.

2. In an action to enjoin a city and its contractor from entering upon and excavating a part of plaintiff's land for the improvement of a street, evidence held not to show a dedication of the strip in dispute as a part of the street.

Dedication—Requisites—Intent.

3. The public, whether in the form of a municipality or otherwise, cannot acquire the real property of a private holder by dedication, unless the intent of the owner thus to give his realty to the public is clearly and satisfactorily established.

[As to what constitutes a dedication of a public street, see note in 129 Am. St. Rep. 576.]

From Coos: JOHN S. COKE, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is a suit by Alexander Christie, as Roman Catholic Archbishop of the Diocese of Oregon, against the City of Bandon and W. H. Webb to enjoin said city and its contractor from entering upon and excavating a portion of plaintiff's land in the prosecution of what the defendants claim to be a proceeding to improve a street called Oregon Avenue in that municipality.

The defendants avow in their answer that the tract in dispute is part of a city street which it is improving under its initiative charter. The answer sets out in great detail the steps taken to commence and prosecute the betterment of the way.

The reply traverses the answer in many important particulars. The contractor as a defendant resisted the complaint on practically the same grounds as the city; hence his answer does not require separate treatment.

AFFIRMED.

For appellants there was a brief over the names of *Mr. G. T. Treadgold*, City Attorney, and *Mr. George P. Topping*, with an oral argument by *Mr. Treadgold*.

For respondent there was a brief over the names of *Mr. John D. Goss*, *Mr. John C. Kendall* and *Mr. Herbert S. Murphy*, with an oral argument by *Mr. Goss*.

MR. JUSTICE BURNETT delivered the opinion of the court.

The answer states that:

“All of the lands included in said Oregon Avenue street improvement are included in a public highway

formerly known as the Bandon-Langlois County road, later known as Abernathy Street and still later known as Oregon Avenue of the City of Bandon; that said highway is, and for more than 20 years has been 60 feet in width, and for its full width has been used during such time by the public and by the municipality of Bandon continuously, notoriously and adversely, and has during all of said time been recognized by all parties, including plaintiff, as such public highway, and has, at all times as aforesaid, been used, maintained and improved by the public authorities as such public highway; * * that said Oregon Avenue extends along the western boundary of the Catholic Church property as described in the complaint, and includes as a part of said avenue a strip off the western boundary of said Catholic Church property extending from the south line of said property in a northerly direction to the north line of Third Street in said city."

This is denied by the reply. For the purpose of showing the authority of the city over the county road the defendants introduced the following order of the County Court of Coos County, of March 6, 1913, reading thus:

"The matter of application of the City of Bandon to acquire jurisdiction and control over roads within the limits of said city: Now at this time comes on to be heard the resolution of the City of Bandon, requesting Coos County, Oregon, to relinquish to said city all jurisdiction and control over all roads lying and being within the corporate limit of said City of Bandon, the said resolution after being duly considered, it is ordered, and this court does hereby release, and relinquish, jurisdiction and control over each and all the county roads within the corporate limits of the City of Bandon, Coos County, Oregon, to the said City of Bandon, provided that the said City of Bandon shall not, by reason of this order for obtaining control of said roads, have any claim upon

the county road fund, or of any road district funds, or of any part or portion thereof."

1. So far as the control of the county road by the City of Bandon is concerned, the instant case is governed by *Cole v. Seaside*, 80 Or. 73 (156 Pac. 569), the substance of which is that the control of county roads is primarily in the legislative power of the state, and that until in plain terms the state has given control thereof to any municipality, the latter cannot assume nor exercise authority over the same. The only legislative grant to the City of Bandon is found in the act of February 18, 1891, entitled "An act to incorporate the town of Bandon, in Coos County, Oregon": Laws 1891, p. 496. By subdivision 14 of Section 39 of the act the board of trustees has authority "to provide for the preservation and removal of all obstructions from the streets, alleys, cross-streets and sidewalks, and for cleaning and repairing the same"; by subdivision 28, "to lay out and construct streets and alleys above and below the ordinary line of the Coquille River; to define the waterfront of said town of Bandon, and to build, construct and regulate landings at the foot of the streets terminating at said waterfront"; and by subdivision 32 "to authorize and empower the county road supervisor of the road district in which the town of Bandon is situated to collect all county road tax within the town limits as county road taxes are collected by the laws of this state, and to apply a sufficient amount thereof to keep all the county roads and bridges within the corporate limits in good condition, and to apply the balance on the county roads in said road district." Section 68 empowers the board of trustees to establish and alter the grade and improve any street or part thereof in the town; and by Section 101 the same sanction is given to the

act of the board in providing by ordinance for laying out, opening, extending, widening, straightening or closing up, in whole or in part, any street, square, lane or alley within the city. These are the only provisions in the legislative charter defining the power of the city over any ground devoted to public travel. It does not include county roads. Subdivision 32 of Section 39 does not affect the county road supervisor, for it is merely declaratory of the authority of that officer already existing at that time, and, besides, it expressly directs him, and not the city, to apply the road taxes to the repair of the county roads. So far, then, as the matter concerns the county road, the city has no authority to exercise control over it.

2, 3. It remains to determine whether the defense has made out that the plaintiff dedicated the strip in dispute as part of a street. In support of the contention of the defendants they introduced in evidence a copy of the official plat filed by the plaintiff, dedicating what is designated thereon as Belle View Addition to Bandon. It seems that the plaintiff originally owned a tract of land within the corporate limits of Bandon, in form a parallelogram, of the approximate dimensions of about 400 feet wide east and west by probably 1,020 feet in length north and south. The plat was filed in the county clerk's office February 14, 1910. The whole of the original tract as it appears thereon is inclosed in dotted lines. What is substantially the south half is laid off in lots and blocks designated by solid lines. On the east side of the map appears indicated by dotted lines what is marked as "Woodland Addition to Bandon, Oregon"; and on the west side there are dotted lines running north and south up to what appears to be Third Street of Bandon, Oregon, leading to the west. On the west oppo-

site the solid lines is the inscription "Abernathy Street Extended." The name "Belle View Addition to Bandon" appears only on the lots and blocks designated by the solid lines. The north half of the original tract is marked as "Catholic Church Property." Between the south half portrayed by the solid lines and the north half bounded by the dotted lines is what is called Second Street. On the east opposite the lots and blocks is the designation "Church Street." There is no name, opposite the tract called "Catholic Church Property," marking any street either on the east, west or north thereof. On the plat is incorporated the following writing:

"Plat of Belle View Addition to Bandon, Oregon, located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 30 & the NE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 25 Twp. 28 S. R. 14 & 15 W. Willamette Merd. The initial point of said addition is a 2" iron pipe 36" long firmly driven into the ground at the S. W. cor. of Block No. 2, whence the W $\frac{1}{4}$ cor. of Sec. 30 Twp. 28 S. R. 14 W of the Willamette Merd. bears E. 55.8 feet and N. 933.24 feet, and the base line from which all measurements were taken is the west line of Blocks 1 and 2, marked at the N. W. cor. of Block No. 1 with a 2" iron pipe 36" long firmly driven into the ground. All angles are right angles and the distances marked on this plat were staked out on the ground as noted. Scale one inch equals fifty feet. Magnetic variation north twenty degrees thirty minutes east."

The dedication proper is in these words:

"Know all men by these presents, that the undersigned, the Roman Catholic Archbishop, of the Diocese of Oregon, does hereby make, establish and declare, the annexed plat of Belle View Addition to Bandon, Oregon, to be the true and correct plat of the same; that all blocks and lots are numbered and subdivided as shown on attached plat; that the streets and alleys are of the width and dimensions shown and that the streets conform to the streets of Woodland Addition

to Bandon and are an extension of the same. The use of all streets and alleys is hereby dedicated to the use of the public forever, without any reservations of any kind whatsoever. In witness whereof, the said party hereto has hereunto set his hand and seal this 22d day of September, 1909.

“[Signed] ALEXANDER CHRISTIE.
“[Corporate Seal.]”

The affidavit of the surveyor required by Section 3268, L. O. L., is here set out, omitting the formal parts:

“E. H. Kern, being first duly sworn, deposes and says that he is the engineer who surveyed and platted the Belle View Addition to Bandon, Oregon; that the accompanying map is a true and correct representation of the same. Initial point, a 2"x36" galvanized iron pipe, driven 6" below surface of ground; whence the $W\frac{1}{4}$ cor. sec. 30 Twp. 28 S R 14 W. W. M. bears E. 55.8 feet and N. 933.24 feet. Bounded as follows: Commencing at the initial point, thence E. 361.02 ft. N. 511.2 ft; W. 361.02 ft; S. 511.2 ft. to beginning. The base line is the W. line of blocks 1 and 2, marked at each end by 2"x36" galvanized iron pipe. All blocks, lots, streets and alleys are of the dimensions and widths as shown on attached plat and field notes and are made a part hereof. All blocks, lots, streets and alleys were properly staked and marked out on the ground.”

This is signed and duly verified by the affiant. The public, whether in the form of a municipality or otherwise, cannot acquire the real property of a private holder by dedication unless the intent of the owner thus to give his realty to the public is clearly and satisfactorily established. The map is a writing to be construed by its terms expressed therein. The limits of the land included in Belle View Addition to Bandon, together with the streets mentioned, are clearly indicated, not only on the plat itself, but also

by the affidavit of the engineer already quoted, and which the dedicator adopted when he filed it for record, containing the writings already set out. So far as the map is concerned and the laying out of the town plat, it cannot be extended beyond its express terms. The area to be affected by the plat does not extend west to the center of Abernathy Street, so called. The only allusions to streets are that they correspond with the streets of Woodland Addition on the east, and the map illustrates this condition. It is plain by the testimony that the spaces included in dotted lines are thus marked on the map for the purpose of showing the relative position of the tract actually included in the addition. It appears in evidence that by a former proceeding the city did condemn a right of way for a street across the northwest corner of the Catholic Church property, and no question is raised by the plaintiff about the validity of its appropriation. The only contention of the plaintiff is that the strip on the west side of the church property claimed by the city to be in the street has never been dedicated to the public use.

An attempt was made by the defendants to prove dedication of that strip by acts *in pais*. The evidence on that point is substantially as follows: That many years ago when the county road was laid out, the vicinity of the premises in question was uninclosed, and in the winter season, when it was muddy, teams would go in almost any direction to avoid the mud, and so the travel covered a space, described by some witnesses, of as much as 80 feet when moving from the south in the general direction of Bandon, or vice versa. Later on Coos County improved the road in question by planking a portion of it and by grading up and putting crushed rock on the remainder, which

threw the travel all to the north of the original holding of the plaintiff, and, according to the witnesses, for some 15 years before the commencement of this suit, the travel had not in any way encroached upon the premises of the plaintiff. It is claimed also that the plaintiff afterward erected a fence on a line which would be the extension of the west line of Belle View Addition to the north, indicating an intent to throw out the strip in dispute into the street. This is explained, however, by the testimony on behalf of plaintiff, to the effect that when the subject of improving the highway by the city was taken up and discussed, it was apparent that it would involve a cut of about 30 feet in the deepest place on the western boundary of the church property, so that to a certain extent it would leave the premises "up in the air," and that it was the talk between representatives of the plaintiff and the city, unofficially however, that if the city would pay for the improvement, no objection would be urged against them taking a street through there in pursuance of which understanding the fence was erected; but when it was sought to charge the property with the expense of the improvement, the fence was taken down, and nothing further done in that direction. The official plat of Belle View Addition cannot be construed to be a dedication of the disputed strip. Indeed, the express terms of the instrument confined it to other property. Considered as a dedication by acts *in pais*, the evidence is clearly insufficient to sustain the same. The result as taught in *Cole v. Seaside*, 80 Or. 73 (156 Pac. 519), is that if the traveled space is to be considered as a county road, the city has no authority to operate upon the same. If we consider the matter in the aspect of a street, there is no dedication of the disputed space, so that

upon either horn of the dilemma the city is proceeding without authority to enter upon the plaintiff's property and to impose an assessment thereon.

Other defects are pointed out in the municipal procedure, but it is unnecessary to consider them. At the foundation of the city's performances is found the want of authority over the tract in question.

The decree of the Circuit Court is affirmed.

AFFIRMED.

**MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE
and MR. JUSTICE BENSON concur.**

Argued May 31, affirmed June 27, rehearing granted October 24,
reargued November 14, modified on rehearing December 27, 1916.
Further rehearing denied January 16, 1917.

FIRST NAT. BANK v. COURTRIGHT.*

(158 Pac. 277; 161 Pac. 966.)

Venue—Foreclosure of Lien.

1. Under Section 396, L. O. L., providing that suits in equity for the foreclosure of a lien on real property must be tried in the county where the property is situated, the trial court had no jurisdiction to foreclose plaintiff's lien on real property situated outside of the county.

Appeal and Error—Jurisdiction of Appellate Court.

2. In an action to foreclose a lien on real property outside of the county, where the trial court did not have jurisdiction for that purpose, the Supreme Court does not have jurisdiction on appeal.

ON REHEARING.

Fraudulent Conveyances—Burden of Proof.

3. Where a debtor conveys substantially all his estate to a near relative, ostensibly to satisfy his debt to the latter, in a suit by creditors to set aside a deed for fraud, the grantee must establish clearly that there was a valuable consideration therefor.

[As to proof of fraud in a suit to set aside a conveyance as being fraudulent as to creditors, see note in 11 Am. St. Rep. 537.]

*On transfer of property by debtor in satisfaction of debt, see note in 36 L. R. A. 341, 361. **REPORTER.**

Interest—Computation—Partial Payments.

4. The rule for casting interest, where partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on a balance of principal remaining due. If the payment be less than the interest, the surplus of the interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied toward discharging the principal, and interest is to be computed on the balance as aforesaid.

Mortgages—Trust Deed.

5. Where land is transferred to a trustee to secure a loan from a bank, it is to be treated as a mortgage, and foreclosed only in the statutory manner.

Mortgages—Duty of Trustee Under Trust Deed—Foreclosure.

6. The *cestui* may call upon the trustee to foreclose such mortgage by appropriate legal proceedings, and apply the proceeds to the debt, or the judgment in which the debt has been merged.

Mortgages—Form of Decree.

7. In a creditors' suit, in which plaintiff was the *cestui* of a deed securing its loan, and the trustee of such trust and the debtor and others were defendants, the complaint asking for decree requiring the trustee to "sell and dispose" of the property held by him as trustee, a decree would be entered merely directing the trustee to foreclose the mortgage by appropriate proceedings, although the plaintiff conceded that it did not seek to obtain strict or ordinary foreclosure of the conveyance, since, in any event, a decree directing the trustee to sell and dispose of the land would not empower a sale without suit to foreclose the mortgage.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

This is a creditor's suit by the First National Bank of Portland, whereby it is sought to subject certain property now in the hands of defendant Morris L. Courtright to the payment of a debt contracted by Harry M. Courtright. The substance of the complaint is that, for the past six or seven years, Harry M. Courtright has been engaged in the business of purchasing delinquent tax certificates and in other transactions germane thereto; that in carrying on the occupation he borrowed large sums of money from the

plaintiff; that on November 4, 1914, he owed plaintiff \$43,500, to evidence which he executed to it his promissory note, bearing interest at the rate of 7 per cent, with the customary provision for attorney's fees; that, upon the failure of the maker to pay this note at maturity, an action was commenced for its recovery, resulting in a judgment for plaintiff in the sum of \$45,190 and \$300 as reasonable attorney's fees, which was duly docketed in the judgment lien docket of Multnomah County; that, during the time Harry M. Courtright was so borrowing money from the plaintiff, largely, if not wholly, with the money so borrowed he purchased and acquired, in addition to a large number of certificates of delinquency from the sheriffs of Multnomah and Clackamas Counties, certain real property in the City of Portland, a description of which is set out in the complaint; that, while he was so borrowing moneys from plaintiff, he represented to it that his net worth exceeded \$100,000; that about November 4, 1914, the date of the execution of the note above mentioned, he represented to plaintiff that he desired to secure the indebtedness due plaintiff, and, without solicitation on the part of plaintiff, he executed to the defendant Security Savings & Trust Company deeds of conveyance of certain real property situated in Skamania County, Washington, and Clackamas County, Oregon, representing that these properties had considerable value, but that, in fact, as plaintiff afterward discovered, were practically worthless; that at various times during the year 1914 while Harry M. Courtright was so indebted to plaintiff, for the purpose of hindering, delaying and defrauding it, he conveyed to Morris L. Courtright, his father, all of the Portland real estate above mentioned, and assigned to him substantially all of the certificates of delin-

quency held by him aggregating about \$37,500 in value; that these transfers were without consideration, and were made with the understanding that the father should hold the property in trust for the sole use and benefit of the son, and that such action has placed the property beyond the power of the court to reach in an action at law, or upon execution; that the purpose of these transfers was to cheat and defraud plaintiff and prevent it from collecting the money due it; that the father paid no consideration therefor, but, at the time and prior to the execution thereof, had full knowledge of the son's fraudulent intent and conspired with Harry M. Courtright to defraud plaintiff, and well knew at the time of such transfers that his son had no other property with which to satisfy plaintiff's claim; that the son has no property within the jurisdiction of the court subject to execution other than certain personal property already seized by the sheriff of about \$1,218 in value; then follow allegations upon which to base a temporary restraining order to certain officials in regard to the disposal of certain property. The prayer is for a decree canceling the transfers to the father as fraudulent and applying the property to the payment of plaintiff's claim; asking the appointment of a receiver; also for an accounting with the father, and for a foreclosure of plaintiff's lien upon the real estate in Skamania County, Washington, and Clackamas County, Oregon, and for general relief.

To this complaint the father and son file separate answers in which, after denying the allegations of fraud and deceit, they allege affirmatively that on August 1, 1914, the son was indebted to the father on account of moneys loaned in the amount of about \$50,000, for which security had been given to the

amount of about \$15,000; that on the same day the father demanded payment from the son of this debt; that the son then assigned to him delinquency certificates of the value of about \$20,000; that on November 4, 1914, the son still owed the father \$15,000, and in payment thereof conveyed to him the Portland property above mentioned; that the assignments and conveyances were made in good faith in payment of a *bona fide* debt without the intent to defraud; and that plaintiff at all times was fully informed as to such indebtedness.

A trial being had, a decree was entered in favor of defendants, from which plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. Joseph Simon*.

For respondents there was a brief over the names of *Mr. Morris L. Courtright* and *Messrs. Ridgway & Johnson*, with an oral argument by *Mr. Albert B. Ridgway*.

MR. JUSTICE BENSON delivered the opinion of the court.

It will be seen from the statement of the issues that we are simply to determine from the evidence whether or not the transfer of property from the son to the father was an honest one and in payment of a *bona fide* debt. The evidence is voluminous, and covers a vast number of individual transactions. We have gone through this record with extreme care, at a considerable expense of time, labor and patience. A detailed analysis would not be of any value to the individual litigants or to the bar generally. It is

therefore deemed proper to say that we are unable to find any convincing evidence that Morris L. Courtright was guilty of any fraud or deceit in connection with the transactions of which complaint is made. It is true that the conduct of Harry M. Courtright has been far from praiseworthy or commendable. He did submit to the plaintiff bank several written statements of his financial condition which represented him as having net assets in excess of \$100,000, when in fact he had no assets of any appreciable value. He does not in any definite way account for the large sums of money which passed through his hands, and the glaring fact remains that he has grossly wronged the bank that befriended him; but we think the evidence justifies the findings of the trial court that he did owe his father a large amount of money, the value of the property transferred does not exceed the indebtedness, and there is nothing in the record disclosing any knowledge upon the part of the father in relation to his son's wrongful acts.

1, 2. We cannot decree a foreclosure of plaintiff's lien upon the real property in Skamania County, Washington, and Clackamas County, Oregon, for the trial court had no jurisdiction for that purpose, and it is therefore beyond our power: Section 396, L. O. L.; 27 Cyc. 1519, and cases there cited.

It follows that the decree of the trial court must be affirmed, and it is so ordered.

AFFIRMED. MODIFIED ON REHEARING.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BRAN and MR. JUSTICE BURNETT concur.

Modified and affirmed December 27, 1916.
Further rehearing denied January 16, 1917.

ON REHEARING.

(161 Pac. 966.)

On rehearing former opinion modified and affirmed.

For the petition there was a brief over the name of *Messrs. Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. Joseph Simon*.

Contra, there was a brief over the names of *Messrs. Ridgway & Johnson* and *Mr. Morris L. Courtright*, with an oral argument by *Mr. Albert B. Ridgway*.

In Banc. MR. JUSTICE HARRIS delivered the opinion of the court.

1. On account of the importance of this suit and because of the large amount of money involved in the controversy, a rehearing was granted in order to afford an opportunity to correct any error that we may have committed in the original opinion reported in *First Nat. Bank v. Courtright*, ante, p. 490 (158 Pac. 277); and, after again hearing the arguments of counsel, we have for the second time scrutinized each of the numerous business transactions, covering a period of about six years, between Morris L. Courtright and his son, Harry M. Courtright. Every one of the many letters, checks, drafts and papers which were received in evidence has been examined with care, and the testimony of all the witnesses has received our closest attention, in order that we might, if possible, discover the truth. We have been mindful of the fact that the Courtrights are father and son, and therefore throughout the entire examination of the record we have applied the rule announced in *Marks v. Crow*,

14 Or. 383 (13 Pac. 55), and again stated in *Wright v. Craig*, 40 Or. 191, 195 (66 Pac. 807, 809):

“Where one who is in debt at the time conveys substantially the whole of his estate to” a near relative, “ostensibly in satisfaction of his debt to the latter, in a suit by creditors to set aside a deed for fraud, it is incumbent upon the grantee to establish by satisfactory proof that there was a valuable and adequate consideration for the deed; and, unless he can give a clear and precise account of the items constituting the alleged debt, a fraudulent intent will be inferred.”

Because of the fact that nearly all of the property of the debtor has been transferred to a near relative, and practically no assets have been reserved to pay another creditor, and on account of the harsh consequences worked by that transfer, we have thrown the searchlight of suspicion upon each letter, check, paper, writing and transaction in order to detect any possible fraud.

To recite the evidence upon which our conclusions are based would be to perform a lengthy, but useless and fruitless, task; and it is therefore sufficient to say that the evidence, when considered in its entirety, and after being subjected to the severe test imposed by the rule defined in *Marks v. Crow, supra*, satisfies us that Morris L. Courtright was in truth a genuine creditor of Harry M. Courtright, and that they agreed that the son was to pay 7 per cent on all loans by Morris L. Courtright. The father procured most of the money by borrowing from banks, and is entitled to credit for all sums borrowed from the banks, as well as all amounts which he was able to supply without borrowing. Morris L. Courtright has satisfactorily shown that on October 7, 1908, he assigned to his son four delinquency certificates, aggregating \$432.27; and by means of checks, drafts, deposit slips

and the records kept by banks it is established beyond a reasonable doubt, even, that Harry M. Courtright received from his father, between October 7, 1908, and July 6, 1914, 71 different cash items, ranging in amounts from \$10 to \$10,000, and aggregating \$82,430.02. The son received from the father the total sum of \$82,862.29 in cash and delinquency certificates; and this entire sum, less \$100, which according to his own testimony Morris L. Courtright "gave" to the son on October 7, 1908, is to be treated as money loaned.

Between January 2, 1912, and August 22, 1914, Harry M. Courtright made 46 cash payments to his father, ranging in amounts from \$30 to \$12,000, and aggregating \$42,367.86. The assignment of the Cherryman mortgage and the conveyances made on April 7, 1914, and July 1, 1914, may be treated as payments to the amount of \$6,634; and in addition to this amount Morris L. Courtright must be charged with \$15,000 on account of delinquency certificates which he had received from his son prior to August 22, 1914, and then assigned to banks in Bay City, where the certificates were still held, as security for money borrowed from those banks. Harry M. Courtright borrowed the total sum of \$82,762.29, and repaid \$64,001.86, during the period ending August 22, 1914. Before striking a balance on that date, however, it is necessary to ascertain the interest earned by the loans made by Morris L. Courtright.

The borrower and lender agreed that the moneys loaned should bear interest at 7 per cent, but the litigants disagree as to the amount of interest earned at that rate. This difference results from the variant methods of computation employed, since one party has used the method known as the "mercantile rule,"

while the other party has followed what is commonly known as the "United States rule." Under the mercantile rule the account is stated calculating interest on each item of the debt and allowing interest on each payment; but this method has received the approval of only a few courts: 22 Cyc. 1566. More than a century ago, in *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471, Chancellor Kent announced a rule for computing interest where partial payments are made, and this method has been adopted by most of the courts in this country: 22 Cyc. 1564. This rule has been heretofore employed by us whenever it was necessary to compute interest where partial payments were made, and we have therefore calculated the interest due from Harry M. Courtright according to the United States rule.

2. The formula prescribed by Chancellor Kent reads thus:

"The rule for casting interest, where partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of the interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied toward discharging the principal, and interest is to be computed on the balance as aforesaid."

Calculating the interest according to the rule adopted here, the loans made by Morris L. Courtright had earned \$12,729.65 during the period ending August 22, 1914. In addition to the \$15,000 in delinquency tax certificates previously mentioned, in July

or August, 1914, Harry M. Courtright assigned to his father certificates amounting to \$20,073.80; and hence, if a balance is struck for the day ending August 22, 1914, it will be seen that Morris L. Courtright is to be credited with a total sum of \$95,491.94 and charged with \$84,075.66, leaving a balance of \$11,416.28 due from Harry M. Courtright.

The plaintiff contends, and we shall assume, without deciding, that Morris L. Courtright has admitted in his answer that the land conveyed to him on November 6, 1914, was taken at a price of \$10,000, although the evidence shows that the net value of the realty does not exceed one fourth of that sum. Even though the land is estimated at \$10,000, and though no interest is calculated for the period commencing August 22, 1914, there is nevertheless a balance of \$1,416.28 due on November 6, 1914, from Harry M. Courtright after the land, figured at \$10,000, is applied on the balance of \$11,416.28 carried forward from August 22, 1914. The plaintiff argues that Morris L. Courtright should be charged with certificates amounting to \$44,831.28, instead of \$35,073.80. Morris L. Courtright resided in Bay City, Michigan, while Harry M. Courtright lived in Portland, Oregon, and the latter assigned certificates to the former, who in turn assigned them to banks in Bay City to secure money borrowed. Whenever a certificate was redeemed, the son wrote to the father to return the certificate, and when the instrument was returned, the son would receive the redemption money for it. The contention made by the plaintiff takes no account of the certificates returned by Morris L. Courtright, and for which the son, and not the father, received the redemption money. As we read the record, Morris L. Courtright did in fact receive certificates amounting to \$44,831.28, together with some additional certificates not charged

against him by the bank; but after tracing the course followed by each certificate, as shown by letters, assignments and other documents, we have ascertained that Morris L. Courtright should only be debited with certificates valued at \$35,073.80 because all in excess of that amount were returned to Harry M. Courtright, who received and then used the redemption money, or sent it to his father as partial cash payment.

After a critical examination of all the testimony and exhibits received in evidence, we can reach no other conclusion than that the moneys received by Harry M. Courtright were loans, and that there was a genuine relationship of creditor and debtor; that the cash, land and certificates which were paid, assigned or transferred to Morris L. Courtright were received and applied by him on a real and not a fictitious debt, without any intention to defraud another creditor; and that, while the debtor preferred one creditor to another, the transaction did not result in the debtor preferring himself, for the reason that it did not involve a reservation of any interest for the debtor.

3-5. The plaintiff urges that in any event it is entitled to "a decree requiring the Security Savings & Trust Company to sell and dispose of the real property" which was conveyed to the company by Harry M. Courtright, although the bank concedes that it "does not by its complaint seek to obtain a strict or ordinary foreclosure of the conveyance made to the Security Savings & Trust Company." We have found that the plaintiff is not entitled to any relief against Morris L. Courtright, and hence the only question remaining is whether the bank is entitled to a decree directing the Security Savings & Trust Company to "sell and dispose of" certain land. On No-

vember 4, 1914, Harry M. Courtright gave his note to the bank in the sum of \$43,500, and then, according to a specific allegation in the complaint, he conveyed his lands in Skamania County, Washington, and Clackamas County, Oregon, to the Security Savings & Trust Company as security for the note. The bank reduced the note to a judgment before the commencement of this suit; no part of the land is in Multnomah County, where this suit was commenced and tried; this is a creditors' bill, and not a proceeding to foreclose a mortgage; and the main purpose for which the suit was commenced fails of accomplishment, for the reason that the bank is not entitled to any relief against Morris L. Courtright. The conveyance is not like the one spoken of in *Ladd v. Johnson*, 32 Or. 195 (49 Pac. 756), but the transfer was made to secure a debt, and therefore the instrument must be treated as a mortgage, and should be foreclosed in the manner prescribed by the statute, and not otherwise: *Thompson v. Marshall*, 21 Or. 171 (27 Pac. 957); *Marquam v. Ross*, 47 Or. 374, 407 (78 Pac. 698, 83 Pac. 852, 86 Pac. 1); *Starr v. Kaiser*, 41 Or. 170, 175 (68 Pac. 521). The bank, of course, has a right to call upon the Security Savings & Trust Company to foreclose the mortgage by appropriate legal proceedings, and have the proceeds of a sale on foreclosure applied on the judgment in which the note has been merged; but a decree directing the company to sell and dispose of the land would not empower a sale without a suit to foreclose the mortgage, and with this explanation a decree will be entered directing the Security Savings & Trust Company to foreclose the mortgage by appropriate proceedings.

Even though the plaintiff is not entitled to an annulment of any transfers made to Morris L. Court-

right, yet under all the circumstances we think it fair that the decree be without costs to any party in either court; and with these modifications we adhere to our original opinion, and affirm the findings made by the Circuit Court.

**MODIFIED AND AFFIRMED ON REHEARING.
FURTHER REHEARING DENIED.**

Argued December 19, 1916, reversed January 16, 1917.

LAIS v. SILVERTON.

(162 Pac. 251.)

Dedication—Statute—Acknowledgment—Signature.

1. A declaration on a recorded plat that the owner extended one of the streets over adjoining land owned by him, but not platted, and dedicated the extension, which was not signed or acknowledged by the owner and was accompanied by no map, was not a statutory dedication.

Dedication—Estoppel—Private Way.

2. Where the owner of three tracts of land lying in a row had platted one of the end tracts and dedicated the streets thereon and then sold the other end tract with an agreement to give a way through the center tract on a line continuing one of the platted streets, and attempted to perform that agreement by doing a dedication of such extension on the recorded plat, but the way was very little used or improved, and the two unplatted tracts later came into the possession of the same owner, there was no dedication of the extension of the street by estoppel.

[As to presumption of dedication from user of highway, see note in *Ann. Cas.* 1914D, 335.]

Municipal Corporations—Public Improvements—Remonstrance—Sufficiency.

3. A tract of land owned by an individual, but divided in the center by a fence parallel to the street to be paved, which separated the cultivated portion from the pasture land, which tract has been all assessed for the pavement, is to be counted as one entire tract in estimating the area of land owned by those remonstrating against the improvement under a charter providing that, if the owner or owners of two thirds of the property adjacent to a street filed a written remonstrance against the proposed improvement, it shall not be proceeded with.

Appeal and Error—Determination of Case—Decree—Change of Conditions.

4. Where pending an appeal from an order erroneously dismissing a suit for injunction against street paving, for the reason that part of the land of one remonstrant was not to be counted in determining the sufficiency of the remonstrance, the paving had been laid so that the injunction would be ineffectual, a decree will be rendered restraining the city from assessing any of the cost of the improvement against the plaintiffs.

From Marion: WILLIAM GALLOWAY, Judge.

Department 2. Statement by MR. JUSTICE BENSON.

This is a suit by J. G. Lais, J. M. Brown, E. J. Brown, M. Small, J. H. Brewer, A. F. Blackerby and Sophia Blackerby to enjoin the City of Silverton from improving McClaine Street in said city. The substance of the controversy is that the charter of the city provides, *inter alia*, that where it is decided that an improvement shall be made, notice thereof shall be published, "and until five days after the expiration of said notice the owner or owners of two thirds of the property next adjacent thereto may make and file with the council a written remonstrance against the proposed improvement and thereupon the same shall not be proceeded with." It is contended by the plaintiffs that they filed such a remonstrance, which the defendant is ignoring, and that unless it is restrained it will proceed to pave the street as proposed.

An answer having been filed, a trial was had and a decree entered dismissing the suit. An appeal was taken to this court, which resulted in a reversal of such decree and a remand to the trial court to take further testimony as to the extent of the property represented upon the remonstrance "and make findings and decree as all the testimony on that subject shall indicate": *Lais v. Silverton*, 77 Or. 434 (147 Pac. 398, 150 Pac. 269, 151 Pac. 712). Further testi-

mony having been taken, a decree was entered dismissing the suit, and plaintiffs appeal. **REVERSED.**

For appellants there was a brief over the names of *Mr. Richard W. Montague, Mr. Walter C. Winslow* and *Mr. Robert Down*, with oral arguments by *Mr. Montague* and *Mr. Winslow*.

For respondent there was a brief with oral arguments by *Mr. George G. Bingham* and *Mr. John H. McNary*.

MR. JUSTICE BENSON delivered the opinion of the court.

As upon the former appeal, the only question for consideration herein relates to the sufficiency of the remonstrance against the improvement. In the prior opinion it was held that in determining the controversy the superficial area of each tract should be represented upon the remonstrance. At the second hearing it was contended by defendant that a certain large tract of land owned by Matthew Small is bisected by a street, thereby isolating the southern portion of the tract from the proposed improvement and eliminating it from the remonstrance. It is conceded by counsel that, if the remonstrants are credited with the entire tract, the city has no power to make the improvement. The plaintiffs insist that there is no street there, and that the entire area must be considered.

As gathered from the evidence, the history of this road is about as follows: On June 8, 1892, Benedict Phelps was the owner of what is referred to herein as the Matthew Small tract. He also owned the adjacent land on the west. He had previously owned land ad-

joining the Small tract on the east which had been subdivided and platted into blocks and lots as "Phelps' Addition to Silverton." Through this addition there is a roadway known as Center Street, running east and west, which at the last-mentioned date terminated at the west end in what is known as Lower Street, the latter being upon the eastern boundary of the Matthew Small tract. On the date referred to Phelps sold the land west of the Small tract to Kittil Funrue, with a verbal agreement to give him an easterly outlet across the Small tract which should be an extension of Center Street. On August 13, 1892, there was indorsed upon the recorded plat of Phelps' Addition to Silverton the following:

"Survey of an Extention of Center or Middle Street in Phelps' Addition to Silverton. Beginning on the east side of the county road at the west end of said Center or Middle street, which is 60 feet wide; thence west in center of extention 24.87½ chs. to the west boundary of B. Phelps land and east boundary of Kittil Funrue's land 6.25 chains south of the N. E. corner of said Funrue's land. This extention of said Middle or Center street, is 40 feet wide and no more. I hereby dedicate the above-described extention as Public street or highway.

"B. PHELPS.

"By JOHN NEWSOM,

"By request of said PHELPS.

"Recorded Aug. 13, 1892.

"JOHN H. McNARY,

"Recorder."

This "extention" was improved by simply cutting out enough second growth fir trees to enable a wagon to pass through, and there is no evidence of any further work having been done thereon in the 24 years that have elapsed since. There is a conflict in the evidence as to whether Funrue or Phelps did the work

necessary to make the road passable. There is some evidence tending to show that Phelps at that time contemplated cutting up the Small tract into smaller pieces and selling them with reference to the extension of Center Street, but he died without having done so. The Small tract has been at all the times mentioned, and still is, inclosed by a fence, and the so-called street extension has always been limited in use by a gate at each end which had been kept closed except when opened momentarily to permit the passage of footmen or wagons. There is not much conflict as to the nature of its use, which in the first instance was to enable Funrue to get to Silverton more conveniently than he otherwise could, to enable him and others to haul things to and from his home and for hauling wood cut on the Phelps land now owned by Small. In 1909 Small became, and is now, the owner of the Funrue land.

1, 2. It is clear that there was no statutory dedication of the extension of Center Street, since the attempted record is not acknowledged, and not even signed by the owner, and no map or plat thereof was filed. It seems equally clear from the evidence that there was no dedication by estoppel *in pais*. As to both of these questions, the conclusion is definitely settled by this court in the well-considered case of *Nodine v. Union*, 42 Or. 613 (72 Pac. 582). Hence it follows that the road across the Small tract was nothing more than a private easement, which could not possibly have the effect of segregating the land into two distinct tracts.

3. Defendant insists that the southern portion of the land in question is not a part of the tract adjacent to McClaine Street, because within the past few years the present owner has built a fence just south of the road-

way already mentioned and has been cultivating the northern portion, growing grain thereon, while the southern portion is still full of stumps, and is used only for pasture. In support of this contention we are cited to the following cases: *New Albany v. Cook*, 29 Ind. 220, which discloses that A is the owner of a portion of a lot fronting upon a street which is being improved, and B owns the other part of the lot, and his portion is not contiguous to the street upon which the work is being done. The court properly holds that B is not liable to assessment, and as an authority it throws no light upon our problem. *Roming v. La Fayette*, 33 Ind. 30, is to the same effect. *State ex rel. Paving Co. v. St. Louis*, 183 Mo. 230 (81 S. W. 1104), is a case wherein it is held that for platted lots ending midway between the street improved and the next parallel street, the assessment district under the charter extends only to the midway line between the street improved on which the lots front and the next parallel street, although the owner may disregard the lot lines and for residence purposes use them as one lot extending from street to street. This case does not aid us, for the reason that the conclusion is controlled by an express provision of the charter. We conclude, then, that the Small tract is an integral body of land adjoining the proposed improvement and entitled to full consideration upon the remonstrance, even as the city authorities evidently thought at the time when they passed the assessment ordinance making the work a lien upon the entire tract.

4. Although the complaint prays for a decree restraining defendant from making the proposed improvement and from assessing the property of plaintiffs therefor, it developed upon the oral argument herein that the city has proceeded with and

completed the work while this appeal was pending, and it would now be a futile thing to enjoin the work. The decree will be reversed, and one entered here restraining defendant from assessing the property of plaintiffs for any part of the cost of such improvement.

REVERSED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE MCBRIDE CONCUR.

Submitted on brief January 10, affirmed January 16, 1917.

MORRIS v. LEACH.

(162 Pac. 253.)

Trial—Trial by Court—Effect of Findings.

1. The findings of the court, made without intervention of jury, have the force and effect of a verdict.

Appeal and Error—Scope—Sufficiency of Evidence.

2. If there is any competent evidence in the record to sustain the finding of the trial court in a case tried without a jury, the judgment must be affirmed.

Assignments—Validity—Requisites and Sufficiency.

3. A properly dated instrument, addressed to an individual and saying, "Kindly pay J. the rent due January 15, 1915, amounting to \$15.00," and signed by the landlord, prior to the giving of which the assignee had been told by phone by the addressee that he would pay the money on such order, is a sufficient assignment, since it particularly describes a specific fund.

Garnishment—Property Assigned.

4. After notice of an assignment of a specific fund is brought home to the debtor, the debt is not subject to garnishment by creditors of the assignor.

[As to garnishment process as "security," see note in Ann. Cas. 1914D, 624.]

Assignments—Validity—Effect.

5. Where the evidence shows that notice of an assignment of a specific fund was brought home to the debtor before execution of a writ of attachment and garnishment, such writ is inadmissible in an action by the assignee to recover the fund.

Appeal and Error—Scope of Review—Preservation of Exceptions.

6. Where no bill of exceptions sets up errors in certain rulings and there is no appeal from such rulings, the specifications of error cannot be considered.

From Multnomah: **GEORGE N. DAVIS**, Judge.

This is an action by J. D. Morris against John P. Leach for rent. There was a judgment in favor of plaintiff and defendant appeals.

Submitted on brief without argument under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief over the name of *Mr. G. E. Hamaker*.

For respondent there was a brief over the name of *Mr. Frederic H. Whitfield*.

In Banc. **MR. JUSTICE McCAMANT** delivered the opinion of the court.

This is an action to recover an installment of rent which became due from appellant January 15, 1915. The original owner of the debt was one Ernest Wells. Respondent claims that the debt was assigned to him by Wells on the 2d of January, and that the assignment, in the form of an order from Wells, was presented to appellant and accepted by him on the 4th of January. Appellant denies that the debt was assigned to respondent, and defends on the ground that he was served on the 8th of January with a writ of attachment and garnishment in an action brought by O. H. Stubrud against Wells and another.

1, 2. The lower court found that the rent in question was assigned to respondent, and that notice thereof was brought home to appellant prior to the service of the writ of garnishment. The case was

tried by the court without the intervention of a jury, and the findings have the force and effect of a verdict. If there is any competent evidence in the record to sustain the above finding, the judgment must be affirmed: *Haviland v. Johnson*, 70 Or. 83, 84 (139 Pac. 720); *Smith v. Badura*, 70 Or. 58, 61, 62 (139 Pac. 107); *Gilbert v. Sharkey*, 80 Or. 323, 327 (156 Pac. 789, 157 Pac. 146).

3. The bill of exceptions shows that Wells gave respondent the following order:

“Portland, Oregon, January 2, 1915.

“John P. Leach, City. Kindly pay J. D. Morris the rent due January 15, 1915, amounting to \$15.00, and oblige.

“ERNEST WELLS.”

Prior to the giving of the order respondent had telephoned appellant about the matter, and appellant had stated that he would just as soon pay the money to respondent if respondent produced an order from Wells. The order was lodged with appellant on the 4th of January, and remained in his hands until the case was tried.

We think that the above was competent evidence to sustain the findings of the lower court. The order accurately described a specific fund. The authorities hold that such an order is sufficient to assign the fund described: 4 Cyc. 38; 5 Corpus Juris, 922; *Tyrell v. Murphy*, 30 Ont. L. 235, 237, 238; *Gray v. Trafton*, 12 Mart. O. S. (La.) 702; *Switzer v. Noffsinger*, 82 Va. 518; *Adams v. Robinson*, 1 Pick. (Mass.) 461; *Robbins v. Bacon*, 3 Me. 346; *Conway v. Cutting*, 51 N. H. 407.

4. After notice of such an assignment is brought home to the debtor, the debt is not subject to garnishment by creditors of the assignor: *Robbins v. Bacon*,

3 Me. 346; *Conway v. Cutting*, 51 N. H. 407; *Drake*, Attachment (7 ed.), § 610.

5. The court did not err in excluding the writ of attachment and garnishment served on appellant subsequent to the date when he was advised of the assignment of the debt to respondent. We have examined the other rulings of the lower court in the matter of evidence received and excluded, and find no error.

6. Appellant also assigns as error certain rulings of the lower court in settling the costs and disbursements of respondent. No bill of exceptions has been attached to the record setting up these alleged errors, nor has an appeal been taken from the rulings of the court thereon. For the reasons set forth in *Perkins v. Perkins*, 72 Or. 302, 310 (143 Pac. 995), we cannot notice these specifications of error.

The judgment is therefore affirmed. **AFFIRMED.**

Argued January 9, reversed January 16, 1917.

PAABO v. HANSON.

(162 Pac. 256.)

Judgment—Setting Aside—Call of Causes—Notice.

1. Since Section 2804, L. O. L., as amended in 1911 (Laws 1911, p. 440), provides that there shall be two terms of the Circuit Court in Lincoln County, one beginning on the first Monday in August, counsel employed in a case in such county is chargeable with notice of such legislation, and the fact that the Circuit Court in his own county was not in session did not justify his assuming that a case on the docket in Lincoln County would not be heard at the August term.

Judgment—Setting Aside—Grounds.

2. Where the judgment appealed from was obtained *ex parte* after notice that the other party could not appear for sufficient reasons, it will be reversed on terms, under Section 103, L. O. L., providing that the court may, in its discretion, relieve a party from a judgment by surprise or excusable neglect.

From Lincoln: JAMES W. HAMILTON, Judge.

Department 1. Statement by MR. JUSTICE McCAMANT.

This is an action brought in the Circuit Court for Lincoln County by Madis Paabo against Anto H. Hanson to recover damages for an alleged malicious prosecution.

The record shows that on the twenty-eighth day of August, 1914, the defendant swore to a complaint in the Justice Court for Rose Lodge Precinct, Lincoln County, charging plaintiff with the offense of malicious mischief. The prosecution having terminated in an acquittal, plaintiff brought this action on the fourth day of November, 1914, charging that the prosecution was malicious and without probable cause, and claiming damages in the sum of \$1,600. The summons was served on the seventh day of January, 1915.

The defendant retained Mr. Allan R. Joy, of Portland, to represent him, and through Mr. Joy demurred to the complaint. This demurrer was overruled, and on the third day of February, 1915, an answer was filed.

On the thirty-first day of July, 1915, plaintiff filed his reply, a copy being sent to Mr. Joy by mail. In the meantime the clerk of the Circuit Court for Lincoln County had telegraphed Mr. Joy on the thirtieth day of July that the case had been set for trial for August 2d. At this time Mr. Joy was away from Portland on his vacation, and his office was in charge of Miss Nellie M. Todd, his stenographer. She replied to the message by letter, advising the clerk that Mr. Joy was out of the city, and distant 14 miles from the nearest postoffice. She stated that the defendant

was not aware that the case was to be tried at that time, and asked the clerk to explain the matter to the court and have the case put over until the return of Mr. Joy. Miss Todd also endeavored to communicate with the defendant. Notwithstanding the request so transmitted, the case was called for trial on the third day of August. In the absence of defendant and his counsel a jury was impaneled, the cause was tried, and a verdict returned for plaintiff in the sum of \$250. Judgment was entered on this verdict. On the thirteenth day of September, 1915, the defendant filed a motion supported by affidavits, asking for the vacation of the judgment and offering to submit to any terms which the court might impose. The supporting affidavits set up the correspondence above referred to and some additional telegraphic correspondence, which passed between Mr. Joy and the clerk on the former's return to Portland. The affidavits further alleged that the courts of Multnomah County were not sitting at the time, and that it was therefore regarded as a vacation period by the bar of that county; that Mr. Joy had not expected to try the case before September 1st; that defendant had a meritorious defense; that his witnesses were scattered throughout Lincoln County, and resided from 30 to 40 miles from the county seat; that the defendant required at least a week or ten days' notice of the trial in order to secure their attendance. The affidavit of Mr. Joy closed with this paragraph:

"Affiant further says that since the first day of February, 1915, defendant has been constantly employed by the State of Oregon as night watchman in the Oregon Building at the Pacific Panama International Exposition at San Francisco in the State of California, and is now so employed, and that such

employment has at all times since February 1, 1915, been well known to and understood by Madis Paabo, the above-named plaintiff."

No counter-affidavits were filed, but the lower court held the showing insufficient, and refused to relieve defendant from the judgment. From this order an appeal is prosecuted. **REVERSED.**

For appellant there was a brief over the names of *Mr. Allan R. Joy* and *Messrs. Logan & Smith*, with an oral argument by *Mr. Joy*.

For respondent there was a brief over the names of *Mr. W. E. Gwynn* and *Messrs. Smith & Shields*, with an oral argument by *Mr. Guy O. Smith*.

MR. JUSTICE McCAMANT delivered the opinion of the court.

1. It is provided by Section 2804, Lord's Oregon Laws, as amended in 1911, that there shall be two terms of the Circuit Court held in Lincoln County each year, and that one of them shall be held on the first Monday in August. In the year 1915, this day fell on the 2d of August. Counsel for appellant was chargeable with notice of this legislation. The fact that the Circuit Court of Multnomah County was not in session at this time did not justify him in assuming that this case would not be heard in Lincoln County at the August term provided for by law.

2. On the other hand, this case bears the earmarks of an attempt on the part of respondent to take improper advantage of appellant by forcing the case on for trial at a time when he knew appellant could not be present, and when it was impossible for appellant to secure the attendance of his witnesses. It seems

that these parties are neighbors, residing in Rose Lodge Precinct in Lincoln County. The neighborhood is remote from any railroad, and inaccessible from the county seat. It appears by the uncontroverted showing made by appellant that he left his home on or before the first day of February, 1915, and from and after that date was continuously employed as night watchman in the Oregon Building at the San Francisco fair, and that these facts were well known to respondent. Respondent withheld the filing of his reply until the thirty-first day of July, which was the last business day before the opening of the August term of court. On the thirtieth day of July respondent began to press the case for trial. Even if Mr. Joy had been in his office and had promptly telegraphed to appellant on receipt of word from the clerk of the court, appellant could barely have reached Toledo in time for the trial, and could not possibly have made the necessary preparation properly to present his case. His witnesses were scattered over Lincoln County, and the inaccessibility of the place where the controversy arose makes plausible the statement in the affidavit of Mr. Joy that appellant would have required a week or ten days to subpoena the witnesses and secure their presence at the trial. Under the circumstances of this case it would have been only a proper courtesy on the part of respondent to have notified appellant, two weeks or more before the beginning of the August term of court, of his intention to press the case on for trial. Such notification was not given. No attention was paid to the request transmitted by Mr. Joy's stenographer that the case might be held in abeyance until Mr. Joy's return to Portland. Respondent must have known that appellant desired to defend the case.

Under these circumstances, we do not think that respondent should be permitted to collect this judgment, based on the verdict of a jury returned after a trial, in which appellant was not heard, either in person or by attorney. We are the more ready to grant relief because appellant was defendant in the lower court: *Higgins v. Seaman*, 61 Or. 240, 244 (122 Pac. 40).

The case seems to us to fall within the purview of Section 103, L. O. L., which provides that the court "may, * * in its discretion, and upon such terms as may be just at any time within one year after notice thereof, relieve a party from a judgment * * taken against him through * * mistake, inadvertence, surprise, or excusable neglect."

In his application for relief from the judgment, appellant offers to submit to such terms as the court may impose. We think that terms should be imposed, for appellant's counsel was certainly at fault. The order will therefore be that the judgment be reversed, provided that appellant deposits with the clerk of this court, within 30 days, the costs and disbursements of respondent in the Circuit Court and in this court; in default of such deposit, judgment to be affirmed.

We have examined all the authorities to which our attention has been directed by the parties, but it would serve no good purpose to review them. We think that the conclusions reached are supported by the doctrine of the following cases: *Higgins v. Seaman*, 61 Or. 240 (122 Pac. 40); *Anderson v. Scotland* (C. C.), 17 Fed. 667; *Virginia Co. v. Harris*, 151 Fed. 428 (80 C. C. A. 658).

It is proper to add that by this opinion we make no reflection on the counsel who appears for respondent on the presentation of this appeal. The record shows

that respondent has retained three sets of attorneys in the course of the litigation. **REVERSED.**

MR. CHIEF JUSTICE McBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

(NOTE—Within the 30 days appellant complied with the terms imposed by the court.—REPORTER.)

Argued December 14, 1916, affirmed January 16, 1917.

SNOW v. BEARD.*

(162 Pac. 258.)

Attorney and Client—Right of Client to Compromise Suit.

1. The client has a right to compromise a suit or action without the knowledge or consent of his attorney, and even against his protest.

[As to right to compensation of attorney who has taken claim to collect on percentage where client takes claim out of his hands, see note in *Ann. Cas.* 1912C, 741.]

Attorney and Client—Compensation—Effect of Compromise.

2. Compromise by a client of a case does not affect his attorneys' right to stipulated and earned compensation, in the absence of agreement reducing such compensation.

Attorney and Client—Action for Compensation—Directed Verdict.

3. In action for attorneys' compensation, *held* not error to deny defendants' motion for directed verdict.

Evidence—Written Contract—Parol Evidence.

4. In action by attorneys for compensation under a written agreement, it was proper to exclude testimony relating to the amount of the fee, when it was payable, and from what sources the money was to be derived, as to which items the agreement was complete in itself.

Attorney and Client—Attorneys' Lien—Property Subject.

5. Where attorneys collected on a judgment \$300 of costs which had been advanced by their clients to pay expenses in preparing for the trial of causes, a lien for their professional services attached thereto, since the object for which the money was advanced had been accomplished, and the costs thus having come into the attorneys' possession in the course of their employment made the sum so received equivalent to a general deposit.

Evidence—Opinion Evidence—Conclusion of Witness.

6. In action by attorney for agreed compensation, a defense being that the attorney had refused to go on with the employment at one time, which defense was answered by showing that the attorney did later in fact go on with the trial, testimony of defendant that the attorney's refusal to proceed with the case was final was mere conjecture amounting to a conclusion, which could properly be stricken out.

Attorney and Client—Action for Compensation—Evidence.

7. In such action it was proper to exclude defendant's answer to a question designed to elicit that he has secured other counsel because of plaintiffs' hostile conduct and attitude, where there was no evidence offered by defendants tending to show they were embarrassed or hindered by any act of plaintiffs, or that they lost any rights to a fair trial, since the mental attitude of a witness or his opinion as to hypothetical statement of facts could not be material.

Attorney and Client—Action for Compensation—Instruction—"Litigate."

8. In action by attorneys for compensation, an instruction that the written contract did not fully set forth what the services were to be, that being for the jury to determine, etc., was not erroneous as directing the jury to consider no services performed by plaintiffs except such as were rendered in litigating causes for their clients; the word "litigate" used in the complaint limiting the service alleged to have been engaged to testing or trying for the clients the validity of disputed claims by suits, actions, or proceedings in courts of law or equity.

Appeal and Error—Harmless Error—Instructions.

9. In action by attorneys for compensation, where it appeared the attorneys did work not contemplated by the terms of their contract, but made no extra charge therefor, and defendant made no counter-claim for damages from plaintiffs' failure to perform their contract, an instruction that, if plaintiffs conducted all the "litigation" which was conducted for the desired end, they were entitled to recover, was not prejudicial to defendants.

Attorney and Client—Action—Instructions.

10. In action by attorneys for services, an instruction authorizing recovery if plaintiffs had completed their part of the contract up to the time of settlement by their clients held proper.

Trial—Instructions—Construction—Reference to Other Instructions.

11. An instruction which conveys a proper meaning when read with other instructions given is not error.

Attorney and Client—Action for Compensation—Instructions.

12. In action by attorneys for services, an instruction that the attorneys could not be deprived of their rights to the stipulated fee for services by the clients' settling the case was not error, where there was no allegation in the answer of damages from refusal of plaintiffs to proceed with litigation, and thereby compelling settlement.

*On dismissal of suit to defeat attorney's lien or claim to compensation, see note in 5 L. R. A. (N. S.) 390.

REPORTER.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1. Statement by MR. JUSTICE MOORE.

This is an action by Zera Snow and Wallace McCamant, partners engaged in the practice of law as Snow & McCamant, against S. Roscoe Beard and Mary B. Gray to recover money. The cause, being at issue, resulted in a verdict and judgment for the plaintiffs in the sum demanded, \$2,895.70, with interest from April 20, 1914, at the rate of 6 per cent per annum, and the defendants appeal. AFFIRMED.

For appellants there was a brief over the names of *Mr. Julius N. Hart* and *Messrs. Smith & Smith*, with an oral argument by *Mr. Hart*.

For respondents there was a brief over the names of *Mr. Charles W. Fulton* and *Mr. MacCormac Snow*, with an oral argument by *Mr. Fulton*.

MR. JUSTICE MOORE delivered the opinion of the court.

It is maintained by defendants' counsel that an error was committed in denying their request for a directed verdict in their favor, interposed when the case was submitted, on the ground that the plaintiffs violated the terms of the contract sued upon, and for that reason they were not entitled to any compensation for the services which they performed. It appears from a transcript of the evidence that the defendants' uncle, S. M. Beard, died testate in Multnomah County, Oregon, January 10, 1910, having devised and bequeathed all his property equally to them, their mother, Elizabeth Beard, their brother, A. Edgar Beard, and their sister, Carrie E. Cadwell, subject,

however, to special legacies amounting to \$1,700 and the expenses of administration. The will designated as executrix Mary B. Gray and as executors A. Edgar Beard and S. Roscoe Beard, who for brevity will hereafter in this opinion be indicated by their middle names respectively. The will was probated in that county, and soon thereafter a controversy arose respecting property formerly owned by the testator, a part of which stood in the name of Edgar, and the legal title to other portions was held by the Beard Fruit Company, a corporation of the State of Washington. The defendants asserted that the testator died seised and possessed of all such property, while Edgar maintained he was the owner of the part which stood in his name; that the Beard Fruit Company was the equitable owner of the portion which it held; and that he was the owner of half the stock of that corporation. In order to have such conflicting rights judicially determined the plaintiffs were employed in September, 1910, by the defendants to litigate their claims to the property last mentioned. Pursuant to such engagement, and on behalf of their clients, the plaintiffs instituted suits, actions and proceedings in their names as follows: In November, 1910, the County Court of Multnomah County ordered Edgar to deliver all papers in his possession belonging to the decedent's estate to Roscoe. No attention was paid to this command, and Edgar was cited to appear for contempt of court, whereupon he complied with the order and was discharged. A *mandamus* proceeding was instituted against Edgar to compel him to permit the defendants and their counsel to inspect the corporation's books and papers and to make copies thereof. In the spring of 1911 proceedings were instituted to remove Edgar as executor. He also commenced like proceed-

ings to have the defendants removed from their trust. Contempt proceedings were brought against Edgar to compel him to file a report showing what he had done as executor. In the summer of 1911 an action was commenced against Edgar to recover the possession of ten shares of the capital stock of the corporation. In order to prepare for the trial of that cause his deposition was taken by the plaintiffs to be used as evidence. Upon the recovery of such stock trustees of the corporation were elected, who adopted a resolution declaring the Beard Fruit Company at the time of the testator's death held certain real property in trust for him and of which the residuary legatees were the equitable owners. Much of the decedent's property was in Clarke County, Washington, where was appointed an administrator of his estate who was not in sympathy with the defendants. An action was commenced in that county against the corporation and a tenant to recover possession of 46 acres of land alleged to have been owned by Mrs. Gray. A suit in equity resulted in which Edgar alleged that the corporation was the owner of the real property. The judge of the Superior Court of that county had been counsel for Edgar, and by reason thereof the causes were tried by the judge of the Superior Court of Cowitz County, Washington, and it was decreed that Mrs. Gray was the owner of an undivided half of the land and that the corporation owned the other moiety. This is the only case that was finally determined in which the plaintiffs did not obtain for the defendants the entire relief demanded. Edgar placed a mortgage of \$5,000 upon 41 acres of land in Multnomah County, the legal title to which it was alleged by the defendants herein be held in trust for the estate. A suit was instituted to cancel that lien, and it having subse-

quently been ascertained that no consideration for the mortgage existed, the suit was dismissed upon stipulation that the lien should be discharged. A suit was also commenced to secure for Mrs. Gray and Roscoe an undivided two fifths of that land, and one was instituted at Vancouver, Washington, by their mother, Elizabeth Beard, to determine the rights of the residuary legatees to the decedent's property in that state. This cause was set for trial in April, 1913, but was then continued. Of the causes tried in the Circuit Court of the State of Oregon for Multnomah County the plaintiffs on July 15, 1913, secured in this court final determinations in their favor in the case of *Gray v. Beard*, 66 Or. 59 (133 Pac. 791), where it was ruled that Edgar held the legal title to land in that county in trust for his uncle's estate, and that the defendants herein were entitled to an undivided two fifths of that real property. So, too, in *Beard v. Beard*, 66 Or. 512 (133 Pac. 797, 134 Pac. 1196), it was held that *mandamus* would lie to compel Edgar, who resided in that county, to deliver to Roscoe, as secretary of the Beard Fruit Company, books and papers of that corporation, whose domicile was in another state. Also in *Beard v. Beard*, 66 Or. 526 (133 Pac. 795), it was decided that Roscoe, as executor, was entitled to the possession of ten shares of the capital stock of the corporation, which definite portions were held by Edgar.

The plaintiffs, having obtained these favorable decisions, concluded it was proper to bring about, if possible, a settlement of the remaining controverted questions. For that purpose Mr. McCamant conferred with E. B. Seabrook, an attorney for the adverse party, to whom was submitted tentative terms upon which it was believed a compromise could be effected. The latter having consented to co-operate in an attempt

to reconcile the existing controversies, McCamant called upon Mrs. Gray, who approved the scheme. He on July 22, 1913, wrote Roscoe, who was then at Ft. Worden, Washington, stating the proposed terms in substance as follows: (1) Edgar to pay the costs recovered against him; (2) Roscoe and Mrs. Gray to waive any claim to the personal property, consisting of a few promissory notes of doubtful value; (3) they also to forego the right to an accounting with Edgar in respect to the affairs of the Beard Fruit Company, allowing Edgar to retain all moneys secured from that source and then in his possession; (4) the latter to liquidate all unpaid charges of administration upon the decedent's estate in Oregon and Washington, including Roscoe's fee as executor, and to pay whatever sum might be allowed by the County Court of Multnomah County for legal services performed, and also embracing \$250 which had then been awarded for that purpose; (5) Edgar to pay the specific legacies of \$1,700; (6) Roscoe and Mrs. Gray to receive from the other devisees and from the Beard Fruit Company quitclaim deeds of real property valued at \$40,750, such estimate to be computed upon what was known as the conservative inventory made by the testator January 1, 1910, the particular tracts to be selected by the adverse party. This list of real property contains what is known as the "selling" price, amounting to \$202,050, and a "conservative" estimate, aggregating \$128,450. The latter appraisal was, in consequence of the loss of title to some of the land by adverse possession, reduced to \$114,350, and by further concessions diminished to \$101,875, of which the defendants were to receive a title in fee to real estate valued by their uncle at \$40,750. In refer-

ring to the proposed settlement Mr. McCamant in his letter to Roscoe of July 22, 1913, says in part:

"While the other side is to have the choice and to give you what they see fit aggregating the figures above named, they really have but little choice in the matter, as I can think of only four schemes by which the property can be divided. I have figured on it with a good deal of care and the allowance to you, if this settlement goes through, will be substantially one or other of the following four schedules of property: (1) River Front, \$15,000; Slummann Hill, \$1,000; Battle Ground, \$8,000; Meadow Glade, \$2,000; Washington Street House, \$6,000; Broadway House, \$6,000; Tabor Heights, \$2,000; Orchard Heights, \$750. Total, \$40,-750.00."

Each of the other schedules contained the first three parcels of land so mentioned and other tracts. In his reply of July 26, 1913, Roscoe wrote Mr. McCamant in part as follows:

"After carefully considering your proposition I am constrained to say that I will agree to a settlement on the terms as outlined in your letter. I do this reluctantly."

An excerpt from another letter written by Roscoe July 30, 1913, is as follows:

"To be perfectly candid, Mr. McCamant, I shall feel rather relieved if the settlement does fail. Since agreeing to your proposition I feel as if I were shirking a plain duty."

Soon thereafter Mr. Seabrook notified plaintiffs that Mrs. Elizabeth Beard and Mrs. Cadwell acquiesced in the proposal and that Edgar had reluctantly assented thereto. The terms of the settlement were then left with R. A. Leiter, one of Edgar's attorneys, to work out the details. Having thus substantially concluded the agreement, the defendants subscribed their names to a writing prepared for them which reads:

"July 30th, 1913.

"Mr. Wallace McCamant,

"611 Electric Building, Portland, Oregon.

"Dear Sir: In confirmation of the contract and understanding under which you have been litigating at our instance since the autumn of 1910, in matters involving the estate of S. M. Beard, deceased, we agree that your fee shall be \$5,000.00, payable at all events on or before the termination of the litigation. It is a part of our understanding that as much of this fee as possible shall be secured from the estate, but we agree that the fee will be paid at all events regardless of the allowance made to you as attorney for the executor. Whatever allowance is made you in that capacity will be regarded as a part of the fee above contracted for, and we will pay whatever additional sum is necessary to insure the receipt by you of the fee above specified.

"Very truly yours,

"S. ROSCOE BEARD.

"MARY B. GRAY."

In consequence of the failure of the residuary legatees to conclude a settlement of their property rights under the will of the testator, the plaintiffs declined further to prosecute Mrs. Elizabeth Beard's cause which was pending at Vancouver, Washington, and set for trial September 17, 1913, and they so notified the defendants. Upon further consideration, however, the plaintiffs concluded to try that suit, and so informed the defendants, but stated that in case of an adverse decision they would not appeal from the decree, believing it could not be reversed. Mr. McCamant appeared at the time and place appointed and tried that case in conjunction with A. L. Miller, an attorney whom he engaged to assist him. After all the testimony had been taken Mr. McCamant, who was then ready to argue the cause, postponed a discussion of the law and facts involved at the request of Judge

Miller, who thought a compromise could be concluded, but believed that if the issues were debated the ill feeling which the parties had cultivated would be intensified, thereby precluding all possibility of a compromise. Mr. McCamant then settled with and paid Mr. Miller for the services which he had performed, whereupon the latter's employment as assistant attorney was terminated. Judge Miller was then retained by the defendants, and on December 16, 1913, he secured a compromise of all the then existing controversies respecting a division of the property of the decedent's estate. Pursuant to that settlement the suit which had been tried at Vancouver, Washington, was dismissed, and deeds were exchanged by the residuary legatees so that the defendants, as tenants in common, received title in severalty to the parcels of real property which they had agreed to accept.

In addition to the charge of \$5,000 for attorneys' fees as specified in the defendants' letter of July 30, 1913, the plaintiffs paid on account of expenses incurred for their clients \$18.65, making \$5,018.65. They received September 18, 1913, \$50; four days thereafter they collected on a judgment which they secured for the defendants the costs amounting to \$322.95; they were allowed attorneys' fees in administering upon the decedent's estate for Mrs. Gray \$250, and for Roscoe \$1,500—aggregating \$2,122.95, thereby leaving due \$2,895.70, for the recovery of which this action was instituted.

It is argued by defendants' counsel that, when the compromise first proposed was not accepted by their clients, they were notified by the plaintiffs that they would not proceed further with the trial of the Elizabeth Beard case then pending at Vancouver, Washington, thereby violating the terms of their agreement

faithfully to prosecute and defend any and all suits, actions and proceedings necessary to vest in the defendants an undivided two-fifths interest in all the property of which their uncle died seised or possessed, whereby the plaintiffs forfeited all right to any compensation for the services which they had performed, and, this being so, an error was committed in refusing to direct a verdict for the defendants. It will be remembered that, though the plaintiffs notified the defendants they declined further to prosecute the case mentioned, they did in fact appear at the time and place appointed and conduct the trial, engaging for that purpose an assistant attorney whom they paid for the services which he performed. It will also be kept in mind that, when all the evidence in the case had been received, Mr. McCamant was ready to make an argument, which was postponed at the request of Judge Miller, in order that another attempt to make a settlement might be made, and that a compromise was ultimately concluded, thereby avoiding the necessity of discussing the issues involved in that suit. It will thus be seen that the plaintiffs conducted all the litigation that arose after their employment in which the defendants were interested until a settlement of their difficulties was reached. The defendants engaged another attorney, Mr. J. N. Hart, who was present in court when Mrs. Elizabeth Beard's suit was tried, but he took no part therein, except to note what transpired in order that he might be better informed with respect to the errors supposed to have been committed than could have been obtained from a mere inspection of the record of the trial in case it should become necessary to take an appeal from an adverse decree, if any should be rendered against his clients. No damages are alleged or counterclaim set

forth in the answer herein by reason of the employment of Mr. Hart, whose services were rendered unnecessary in consequence of the settlement that was made.

It was admitted by defendants' counsel at the trial of this action that the fee demanded by the plaintiffs was reasonable and the services which they performed were faithfully and ably conducted. After each of the defendants had agreed upon the settlement which was proposed, they subsequently refused to accede to the stipulated terms, whereupon Mr. McCamant at first informed them that unless they concluded a compromise the firm of which he was a member would not further represent them at the trial of the cause then pending at Vancouver, Washington, and they should secure another attorney for that purpose. He later notified them, however, he would try that suit in the lower court, but would not appeal from an adverse decree rendered therein, believing a reversal thereof could not be obtained. He did try that case, and after all the evidence had been received he postponed his argument therein at the suggestion of Judge Miller, who believed a final settlement could be made, and who negotiated a compromise without consulting him. Is it fair or just that under the circumstances detailed the plaintiffs should be denied any compensation for the faithful and valuable services which they performed because of the alleged technical breach of their contract of employment to litigate all questions that might arise in order to vest in the defendants the legal title to two fifths of the property devised and bequeathed them by their uncle? In discussing this question it must not be forgotten that no breach of the contract of employment ever occurred, and that, though the plaintiffs at first declined further to pro-

ceed in the trial of the Elizabeth Beard cause, they subsequently disavowed such conclusion, and so informed the defendants, pursuant to which notice they appeared at and conducted that trial.

1, 2. In *Allcorn v. Butler*, 9 Tex. 56, it was ruled that, when one attorney at law procures another to represent him in a case of which the client has notice and makes no objection, the client cannot afterward, when the attorney whom he employed sues for his fee, object to the right of the latter to make the substitution, and that a contract between attorney and client for a specific fee is not affected by a compromise of the suit. In deciding that case Mr. Justice WHEELER, speaking for the court, observes:

“The only question of the case deserving of notice is whether the defense of a failure of consideration was made out in evidence; and we are of opinion that it was not. The defendant, Allcorn received the professional services of Butler, in pursuance of their contract, through a series of years; and, although the latter did make the declaration that he could no longer attend to the case, he did not act in accordance with that declaration, but, on the contrary, engaged others to attend to the case for him. The acceptance of their services by the defendant precluded him from afterward objecting to the right of Butler to make the substitution. The fact that the defendant saw fit to compromise the suit did not deprive the attorney of his right to his fee.”

The right of a client to compromise a suit or action without the knowledge or consent of his attorney, and even against his protest, is settled by our adjudications: *Jackson v. Stearns*, 48 Or. 25 (84 Pac. 798, 5 L. R. A. (N. S.) 390); *Jackson v. Stearns*, 58 Or. 57 (113 Pac. 30, Ann. Cas. 1913A, 284, 30 L. R. A. (N. S.) 639). Notwithstanding the existence of such right, it cannot be wrongfully exercised so as to deprive the attorney of

his compensation: 2 R. C. L. 1050. To the same effect, see, also, *Baldwin v. Bennett*, 4 Cal. 392; *Elk Valley C. M. Co. v. Willis*, 149 Ky. 449 (149 S. W. 894); *Kersey v. Garton*, 77 Mo. 645; *Whittle v. Tompkins*, 94 S. C. 237 (77 S. E. 929); *Myers v. Crockett*, 14 Tex. 257. The defendant's employment of Judge Miller to negotiate a final settlement of the entire controversy did not, in the absence of an agreement reducing the specified attorney fee, deprive the plaintiffs of the compensation stipulated to be paid them: *Townsend v. Rhea*, 38 S. W. 865 (18 Ky. Law Rep. 901); *Lipscomb's Admr. v. Castleman*, 147 Ky. 741 (145 S. W. 753).

3. A careful examination of the entire testimony given at the trial of this cause shows the plaintiffs are justly entitled to the attorney fee agreed upon; and, such being the case, no error was committed in denying the motion for a directed verdict in favor of the defendants.

4. It is maintained by defendants' counsel that his clients' letter of July 30, 1913, does not contain all the terms of the contract of employment, and, this being so, errors were committed in excluding over objection and exception evidence which was offered as tending to prove the entire conditions of that agreement. On the cross-examination of a witness for the plaintiffs their counsel objected to a question relating to the services which they were to perform. Thereupon the defendants' counsel observed, "We have a right to show what work they undertook to do," to which remark the court replied, "No question about that." The defendant S. Roscoe Beard, in referring to the written estimate of this property made by the deceased a week prior to his death, and alluding to the plaintiffs' contract of employment, testified:

"The agreement, as I have always understood it, was that Mr. McCamant was to reduce to the possession of the executor all of the contested properties in this inventory."

In ruling upon an objection to the admission of testimony offered the court said:

"You are confronted with this document of July 30, 1913, which I hold now contains the terms of the agreement, in so far that it fixes the amount, the source from where it is to come, and the time when it is to be paid. As to what services they [the plaintiffs] were to perform, that is another matter. Your question does not go to that."

As illustrating the view which the court entertained respecting the letter referred to, a part of its charge to the jury reads:

"At this point I will instruct you that the contract between the plaintiffs is set forth in Exhibit 'A,' although that contract does not set forth fully what the services were to be. That matter you are to determine. But who it was to be paid to, how it was to be paid, and when it was to be paid are all fixed by Exhibit 'A,' and I instruct you that Exhibit 'A'—that the agreement as set forth by Exhibit 'A'—was a contract to litigate certain questions, a contract to conduct litigation. It was not a contract to effect a settlement or to get results. It was distinctly a contract of employment as attorneys to conduct litigation."

From the remark of the court to which attention has been called on this branch of the case, and from the part of the charge quoted, it will be seen that the defendants were permitted fully to prove what services the plaintiffs were to perform. The only limitation placed by the court upon the letter of July 30, 1913, in excluding testimony related to the amount of the fee, when it was payable, and the sources from which the money was to be derived. As these items

were specified in the writing the court properly excluded all testimony relating thereto. The other matters, however, not so indicated in Exhibit 'A' were under the general rule of evidence correctly held to be admissible: *Jones v. Dove*, 6 Or. 188; *American Contract Co. v. Bullen Bridge Co.*, 29 Or. 549 (46 Pac. 138); *McKinney v. Statesman Publishing Co.*, 34 Or. 509 (56 Pac. 651); *Ruckman v. Imbler Lumber Co.*, 42 Or. 231 (70 Pac. 811); *Williams v. Mt. Hood Ry. & P. Co.*, 57 Or. 251 (110 Pac. 490, 111 Pac. 17, Ann. Cas. 1913A, 177); *Stuart v. University L. Co.*, 66 Or. 546 (132 Pac. 1, 1164, 135 Pac. 165); *Holmboe v. Morgan*, 69 Or. 395 (138 Pac. 1084). No error was committed in the respect alleged.

5. The plaintiffs collected on a judgment costs amounting to \$322.95, which sum the court did not require should be paid over to the defendants. This money had been advanced by them to pay expenses to be incurred in making preparation for the trial of causes, and it is argued that, as the deposit was made for a special purpose, no attorney's lien could attach to it. The object for which the money was advanced had been accomplished, and the costs thus having come into the plaintiffs' possession in the course of their employment made the sum of money so received equivalent to a general deposit to secure the payment of their professional compensation, and hence a retaining lien attached: *State v. Lucas*, 24 Or. 168, 173 (33 Pac. 538, 540); 2 R. C. L. 1065; *Andrews v. Morse*, 12 Conn. 444 (31 Am. Dec. 752, and note at page 759).

6. The defendant S. Roscoe Beard having testified that after declining to try the Elizabeth Beard case Mr. McCamant telephoned he would attend the hearing of that cause, but under no circumstances would he carry the case to the Supreme Court of Washing-

ton, was asked by his counsel: "Did you take that to be final?" The witness answered: "I certainly did, and employed another attorney. Q. Was it final? A. It certainly was." An objection was interposed to the inquiry on the ground that it called for a conclusion of the witness. Before any ruling thereon was made the defendants' counsel inquired: "What, if anything, did Mr. McCamant do after that?" The plaintiffs' counsel then moved to strike out the answer to the inquiry: "Was it final?" Thereupon the court remarked: "The answer will have to be stricken out. An exception is allowed." It is contended by defendants' counsel that an error was thus committed. A compromise of all the controverted questions involved in a settlement of the decedent's estate having been accomplished, it was not essential to take a decree in the Elizabeth Beard suit, which had been tried, nor was it necessary to prosecute an appeal from a final determination in that case to the Supreme Court of the State of Washington. If a review of the decree had been required, and by reason of the plaintiffs' refusal to prosecute it the defendants were obliged to obtain other counsel for that purpose, the witness might, under the conditions supposed, have testified that Mr. McCamant's declination was final. The testimony so stricken out was a mere conjecture amounting to nothing more than a conclusion of the witness, which was clearly objectionable and properly stricken out.

7. The defendants' counsel inquired of S. Roscoe Beard: "Coming down now to the settlement of December, 1913, I will ask you to state why that settlement was entered into." An objection to this question on the ground that it was immaterial was sustained and an exception allowed. Judge William

Smith, the father-in-law of Roscoe, on direct examination for the defendants was asked by their counsel: "Now, what did you do, or S. Roscoe Beard, in connection with yourself, in reference to the employment of other counsel?" The witness replied: "We proceeded to secure other counsel. Q. Why did you do that?" An objection to the inquiry on the ground that the court had already ruled upon the question was sustained, and an exception allowed.

It is argued by defendants' counsel that the testimony so excluded was admissible, as tending to substantiate an averment of the answer:

"That by reason of the * * hostile conduct and attitude of plaintiffs toward defendants, designed by plaintiffs to that end, these defendants were harassed, annoyed and embarrassed and hindered to such an extent that they were unable to proceed with said litigation, and were thereby compelled to enter into a compromise agreement with their opponents."

The testimony shows that the defendants had employed Mr. J. N. Hart, a competent attorney, to attend the trial of the Elizabeth Beard case, so that he might from a personal observation possibly be better prepared to take an appeal from an adverse decree than he could have been from an inspection of a transcript of the testimony received in that case. No evidence was offered by the defendants tending to show they were prevented or hindered by any act of or notice given them by the plaintiffs from taking a decree in the case tried at Vancouver, Washington, or from reviewing such final determination if it were necessary. If it had appeared that the defendants for any reason had been unable to procure other counsel, or if by fraud they had been deprived of a fair trial of the Elizabeth Beard suit, a foundation might thus have been established for the admission of the

answers sought to be elicited by the inquiries to which objections were made. If the plaintiffs did anything warranting an inference that they violated the terms of their contract of employment, evidence thereof was held admissible and was received for that purpose. Responding to the alleged breach of such agreement the defendants had the right freely to state what they did or were compelled to forego in consequence thereof. What the mental attitude of a witness was or his opinion as to a hypothetical statement of facts could not be material, and no error was committed in these respects.

8. It is maintained that an error was committed in charging the jury as hereinbefore quoted, in that such instruction improperly assumes Exhibit "A" embraced the entire contract; that such writing does not state whether it is an agreement to effect a settlement or to get results; that the part of the charge quoted takes from the jury any consideration of what the plaintiffs were to do for the defendants; and that it directs no services should be considered except such as were performed in conducting litigation. A casual glance at the instruction will show that the court considered the letter of July 30, 1913, as complete within itself only in the particulars specified, and the jury was distinctly told the contract did not fully set forth what services the plaintiffs were to render. The complaint sets forth the discordant assertions of the respective parties as residuary legatees to the testator's property, and substantially alleges that the plaintiffs were employed by the defendants to litigate the conflicting claims to the end that they might be adjudged to be the owners of two-fifths interest in such property. The word "litigate" as used in the initiatory pleading limits the service alleged to have been engaged to

testing or trying for their clients the validity of disputed claims by suits, actions or proceedings in courts of law or equity. The averment of the complaint referred to necessarily excludes an employment to effect a settlement or to get results, but shows what the plaintiffs were to do for the defendants. It is not believed the instruction complained of can reasonably be construed as directing the jury to consider no services performed by the plaintiffs except such as were rendered in litigating causes for their clients.

9. In another instruction, the sufficiency of which is challenged, the court said:

"If the plaintiffs did conduct all the litigation that was conducted for the purpose of accomplishing the end contemplated by the parties, then they are entitled to recover. * * If they failed to conduct, that is, to appear in and argue and present any cases that were presented or conducted or argued, then they have failed in their contract. It was not necessary that either Snow or McCamant should appear personally; * * but they were to conduct, either by themselves, or persons employed by them, whatever litigation was necessary. Now, if they did, by themselves, or by other persons employed by them, conduct, appear in, and argue all the litigation that was conducted, argued, or tried, then they have fulfilled their contract. That is the matter to be determined, not whether the litigation was settled, not whether the parties came to an agreement, but did these gentlemen fulfill their obligations? And you will determine that by what they did."

It is argued that this instruction, like the preceding, emphasizes the single idea which the court seemed to entertain, that the contract of employment requires the plaintiffs to do nothing more than conduct litigation; that if any of the controverted questions were settled by the agreement of December 16, 1913, through

the efforts of other attorneys whose services were necessitated by the failure and refusal of the plaintiffs to keep their engagement, the benefits of the compromise inured to the latter as though they had tried all the issues that were involved; that the plaintiffs were required by the terms of their agreement personally to conduct all the business pertaining to a settlement of the decedent's estate so as to vest in the legatees the respective interest in the testator's property to which each was entitled, and the performance of such services could not legally have been delegated to or exercised by another attorney. The testimony shows that the plaintiffs frequently conferred with the defendants respecting their rights; that a part of the probate work in Multnomah County, Oregon, which was not contemplated by the terms of the agreement was performed by Mr. McCamant; and that he did many things for the defendants not within the letter of the agreement. No extra charge, however, is made for performing such services. Nor does the answer set forth any counterclaim or specify any amount as damages sustained by the defendants by reason of the plaintiffs' failure to keep and perform their contract. If, under such circumstances, the plaintiffs performed all the services required of them until the compromise was concluded, it is difficult to see how the defendants could have been prejudiced by the instruction under consideration when no counterclaim was interposed. No services were delegated by the plaintiffs to another attorney. An assistant counsel was employed, and his compensation was paid by them, but at all times they supervised and conducted the trials.

10. It is contended an error was committed in charging the jury as follows:

"In order to entitle the plaintiffs to recover in this action they must have completely performed the services agreed by them to be performed; and if you find from the evidence the plaintiffs failed in any substantial particular to perform their contract of employment, your verdict should be for the defendants. They must have completely performed the services. Of course, whenever people settle the litigation, then there is nothing to perform. There was nothing to do after this matter was settled by the agreement of December 16th. That ended the whole litigation."

It is believed this instruction correctly stated the law applicable to the facts involved when the language employed is read in connection with the rule by which an attorney is entitled to a specific fee, notwithstanding his client may have compromised the controversy: *Allcorn v. Butler*, 9 Tex. 56.

11. Complaint is made of the following instruction:

"It appears that the agreement of the parties was not reduced to writing when they started. It was reduced to writing on July 30, 1913, and is the celebrated Exhibit 'A,' which I have already told you is a contract to litigate. I instruct you that this contract set forth in Exhibit 'A' is binding upon the parties to the litigation and measures the rights of the respective parties. If you find that the plaintiffs performed the services for which the defendants agreed to pay them the sum of money mentioned, then your verdict will be for the plaintiffs in the amount named in the contract, less the credit which the plaintiffs admit the defendants are entitled to."

Instructions should be construed in their entirety, and not by disconnected clauses: *Wellman v. Oregon Short Line Ry. Co.*, 21 Or. 530 (28 Pac. 625); *Smitson v. Southern Pac. Co.*, 37 Or. 74 (60 Pac. 907); *Wadhams v. Inman*, 38 Or. 143 (63 Pac. 11); *Farmers' Bank v. Woodell*, 38 Or. 294 (61 Pac. 837, 65 Pac. 520);

Sonnixsen v. Hood River Gas & Electric Co., 76 Or. 25 (146 Pac. 980). Interpreting the instruction last set forth with the part of the charge first hereinbefore quoted, it is believed no error was committed as alleged.

12. It is insisted that an error was committed in telling the jury:

“When a client contracts with an attorney to pay a stated sum for stated services, and thereafter settles with his adversary, and thereby terminates the litigation, the attorney is entitled to recover the stipulated fee. The client by going and settling the case cannot deprive the attorney of his rights.”

The language complained of correctly states the rule applicable to such a state of facts as has hereinbefore been determined. It is argued, however, that this instruction permitted the plaintiffs to take advantage of their own wrong in refusing further to prosecute the Elizabeth Beard suit, thereby compelling the defendants to enter into the compromise agreement. It will be remembered that, though the defendants were informed by the plaintiffs that they would not further represent them in the trial of the cause, such notice was countermanded, and they did try that suit. Pending a final determination, which was postponed in order to allow the defendants to conclude a settlement, a compromise was made without conferring with the plaintiffs. If the defendants sustained any loss by the plaintiffs' conduct, it is difficult to understand why they did not allege in the answer in what sum of money, if any, they were damaged. In the absence of such an averment, no error was committed in the respect mentioned.

Other errors are assigned, but a careful examination thereof, when viewed in the light of the entire

transcript before us, leads us to the conclusion that the judgment should be affirmed.

It is therefore so ordered.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE BEAN concur.

MR. JUSTICE BURNETT taking no part in the consideration of this case.

Argued December 20, 1916, reversed January 16, 1917.

ROSE v. PORT OF PORTLAND.*

(162 Pac. 498.)

Constitutional Law—Initiated Amendments—Construction.

1. In the construction of initiated constitutional amendments, the intent of the people should be ascertained and given full effect, without straining any of the language, or distorting it, or giving it an unnatural meaning, but according every word, clause and sentence whatever consistent meaning the context naturally suggests.

[As to construction of initiative or referendum provisions in Constitution, statute or municipal charter, see note in *Ann. Cas.* 1916B, 819.]

Constitutional Law—Initiated Amendments—Construction Together.

2. Initiated constitutional amendments adopted by the electorate at the same time must be construed together.

Municipal Corporations—Powers—Construction.

3. To the extent that attributes of sovereignty are granted to local subdivisions, the language carrying the grant should be strictly construed, as such grant is a limitation upon the power of legislation.

Municipal Corporations—Port—Initiative Amendment of Charter—Constitutional and Statutory Provisions.

4. Laws of 1901, page 417 (Sections 6076-6105, L. O. L.), revising all previous legislation as to the creation of the Port of Portland as a municipal corporation by Section 6078, empowers the port to improve the harbor in the Willamette River "at the City of Portland," and by Section 6079 empowers it to control the river in the harbor "at the City of Portland," and further grants the right to make regu-

*On initiative and referendum generally, see comprehensive note in 50 L. R. A. (N. S.) 204.

lations for the navigation "of said harbor in said City of Portland"; and in 1912 the legal voters of the port, acting on an initiative petition, attempted to amend their charter by including the power to dredge a slough in the Columbia River within the port, but outside the city limits. Article XI, Section 2, of the Constitution as amended and adopted in 1906, provides that corporations may be formed under general laws, but shall not be created by special laws, and that the legislative assembly shall not enact or amend any charter for any municipality, city or town, and grants the legal voters of every city and town power to amend their municipal charter, and Article IV, Section 1a, of the Constitution as amended and adopted at the same time, provides that the initiative and referendum powers reserved by the Constitution shall be reserved to the legal voters of every municipality and district as to all the special and municipal legislation, and that the manner of exercising such powers shall be prescribed by general laws, except that cities and towns may provide the manner of exercising such powers as to their municipal legislation, and Article IV, Section 1 of the Constitution as amended and adopted in 1902, declares that the legislative authority of the state shall be vested in a legislative assembly, and reserves to the people power to propose laws and constitutional amendments and to enact them at the polls, and reserves power to approve or reject legislative acts. *Held* that charters or laws, granting or enumerating the powers exercisable by a corporation, are indispensable, and that while cities and towns can enact or amend their own charters, no other corporation, such as a port, can, without an enabling act, legislate power unto itself to legislate, so as to amend its charter or act of incorporation.

Municipal Corporations—Statutes—Port—Amendment of Charter—Legislative Power—"Referendum"—"Any."

5. Article IV, Section 1a, of the Constitution as amended and adopted in 1906, provides that the initiative and referendum powers reserved to the people by the Constitution shall be further reserved to the legal voters of any municipality and district as to all special and municipal legislation; that the manner of exercising such powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation, and Article XI, Section 2, of the Constitution as amended and adopted in 1906, provides that corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws, and that the assembly shall not enact or amend any charter or act of incorporation for any municipality, city or town, and that the legal voters of every city and town may enact or amend their municipal charter subject to the Constitution. *Held*, that the word "referendum" of itself implies the existence of a law-making body other than the legal voters; that the word "any" may sometimes signify "every" or "all," but primarily means one individually out of a number, and is a derivative of one signifying an indeterminate unit, or number of units out of many or all; and that, in view of the history and purpose of the amendment, the legislative assembly, while it cannot enact a special measure, amending a city or town charter, may enact a special law, amending the charter or act of incorporation of a municipality other than a city or town, such as a port, and that if the assembly passes a special measure for a municipality other than a city or town, its legal voters can apply the referendum to that measure.

Judgment—Persons Concluded—Municipalities.

6. A judgment for or against a municipal corporation in a suit concerning a matter of general interest is binding, not only on the municipality and its officers, but also upon citizens or taxpayers in so far as it concerns their interests as members of the general public, and a judgment between certain residents or taxpayers and a municipality may be conclusive on all other citizens similarly situated.

Judgment—Conclusiveness—Appellate Court.

7. The decision of an appellate court is conclusive upon the parties as to the matter adjudged in subsequent litigation between them in the same or any other court, and this is true even though the appellate court has since decided differently in other cases.

From Multnomah: GEORGE N. DAVIS, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

The object of this suit is to determine whether the Port of Portland can lawfully expend its funds in dredging and improving Oregon Slough. Hayden Island divides the waters of the Columbia River, as they move westward to the sea, so that a portion of the stream passes along the south side of the island through what is known as Oregon Slough and the remainder flows through the main channel along the north side until it reaches the lower end of the island where all the waters are again united. The lines traced by the Columbia and Willamette Rivers may be likened to the letter Y. The Willamette forms one arm of the Y by flowing through the City of Portland and running in a northwesterly direction until it empties into the Columbia; and the other arm of the Y is supplied by the Columbia. The stem of the Y is drawn by the Columbia running westward from the confluence of the rivers to the sea. The arms of the Y inclose a body of land which is known as the Peninsula district and upon which many large and important industries are located. Oregon Slough is in the arm of the Y formed by the Columbia River and consequently the confluence of the two

rivers is west of and below Hayden Island and Oregon Slough. Many of the industries which have been established in the Peninsula district are located on or near Oregon Slough and need the use and development of the harbor in Oregon Slough for the purpose of promoting their business interests. Oregon Slough is within the boundary lines of the Port of Portland, but it is not included within the limits of the City of Portland.

The legislature created the Port of Portland in 1891 by an act which declares in Section 2 that the object of the port "shall be to so improve the Willamette River at the cities of Portland, East Portland and Albina (now united and known as the City of Portland), and the Willamette and Columbia Rivers between said cities and the sea". Laws of 1891, p. 791. Afterwards, the legislative assembly revised all previous legislation and merged it into a single enactment which is found in Laws of 1901 page 417, and is codified in Sections 6076 to 6105 L. O. L. inclusive. Section 3 of the act (Section 6078 L. O. L.) gives the port "power to so improve the harbor in the Willamette River at the City of Portland, and the channel of the Willamette and Columbia Rivers between said harbor and the sea;" Section 4 (Section 6079 L. O. L.) repeats the limitation, found in Section 3, when power is granted to control the Willamette River "in the harbor at the City of Portland, and of the Willamette and Columbia Rivers between said harbor and the sea;" and the same restriction appears in the language which grants the right to make rules and regulations for the navigation and use "of said harbor in said City of Portland" or of the Willamette and Columbia Rivers "between said harbor and the sea."

At an election held in 1908, the legal voters of the port adopted an initiative petition to include the power to maintain a towage and pilotage service between the port and the open sea; and in *Farrell v. Port of Portland*, 52 Or. 582 (98 Pac. 145), this court ruled that the amendment was legally adopted.

Acting upon an initiative petition the legal voters of the Port of Portland at an election held on November 5, 1912, attempted to amend their charter or act of incorporation by including the power to dredge Oregon Slough and since that time considerable sums have been expended in the improvement of that waterway. On October 5, 1916, the port commissioners directed the general manager to place a dredge in Oregon Slough and proceed to make a channel of a prescribed depth. The plaintiff questions the right of the port to expend money on that intended improvement.

The complaint declares that the defendant intends to carry out the resolution passed by the commissioners and asks that the port be enjoined from using any funds in the improvement of Oregon Slough. The port demurred to the complaint and owners of some of the industries interested in the development of the waterway intervened and answered. Their answer in substance avers that the improvement of Oregon Slough is necessary for their enterprises; that they have contributed large sums which have been used for improving the slough; and that they made these contributions, established their plants and made their investments in reliance upon the decision in *Farrell v. Port of Portland*, 52 Or. 582 (98 Pac. 145), holding that the port could amend its charter. The plaintiff demurred to the answer of the interveners. After the court sustained the demurrer to the complaint and overruled the one to the answer, the plaintiff declined

to plead further and then appealed from the consequent decree dismissing the suit.

REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. M. E. Crumpacker*.

For respondents, the Port of Portland and its commissioners, there was a brief over the name of *Messrs. Wood, Montague, Hunt & Cookingham*, with oral arguments by *Mr. Erskine Wood* and *Mr. Richard W. Montague*.

For respondents and interveners there was a brief over the names of *Messrs. Carey & Kerr* and *Mr. Omar C. Spencer*, with oral arguments by *Mr. James B. Kerr* and *Mr. Spencer*.

MR. JUSTICE HARRIS delivered the opinion of the court.

It is plain, and counsel for the port concede, that the legislative act of 1901 does not empower the Port of Portland to improve Oregon Slough for the reason that it is outside the limits of the City of Portland and is at a point on the Columbia River above and east of the mouth of the Willamette River, and is not any part of "the harbor in the Willamette at the City of Portland" and is no part of "the channel of the Willamette and Columbia Rivers between said harbor and the sea"; and, therefore, no funds can be expended in the improvement of Oregon Slough unless the charter was amended in 1912. The steps taken to bring about the election and attempted amendment in 1912 were regular in all respects and the only question involved is whether the legal voters of a port can amend their own charter. If the voters of the port cannot on their own initiative, and without a

law granting power or an enabling act which carries a continuous offer of corporate authority, legislate unto themselves power to legislate, then the charter was not amended in 1912; but, if they can legislate authority unto themselves without the aid of a law passed by the legislature or the people of the whole state, then the charter was legally amended and the port possesses authority to improve Oregon Slough.

If the reasoning employed and the conclusion reached in *State ex rel. v. Astoria*, 79 Or. 1 (154 Pac. 399), are to govern, then, that case is decisive here for it is there held that the legal voters of a port cannot on their own independent initiative amend their charter. While this appeal could, without further discussion, be determined upon the authority of the latest precedent, nevertheless, on account of the immediate as well as the future importance of the questions presented, they have been examined and considered anew.

This litigation arises out of the difficulty encountered in construing two amendments to the state Constitution which were adopted in 1906 and are designated as Article XI, Section 2, and Article IV, Section 1a. All that part of Article XI, Section 2, which is material here, reads thus:

“Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon.”

Preserving the punctuation found in the initiative petition filed with the Secretary of State, Article IV, Section 1a, is here set out in full:

“The referendum may be demanded by the people against one or more items, sections or parts of any act of the legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this Constitution, are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than 10 per cent of the legal voters may be required to order the referendum, nor more than 15 per cent to propose any measure, by the initiative, in any city or town.”

The punctuation of the above section as it is printed in Lord's Oregon Laws is in some respects different from the punctuation found in the petition itself.

1. Each of the two sections is an initiated amendment and both were adopted by the people at the same election. These amendments were enacted by the people and for themselves; it is their Constitution; and, if possible their intent should be ascertained and given full effect, for the reason that the inquiry is not what the people can do but the inquiry is: What have they done? None of the language should be strained or distorted or given an unnatural meaning; but, every word, clause and sentence should be accorded whatever consistent meaning the context naturally suggests.

2. All the adjudications that have spoken on the subject have, without a dissenting voice, said that

these two amendments must be construed together for the reason that they were adopted by the electorate at the same time. The language employed by the two sections has provoked much debate and produced a variety of opinions concerning the true construction to be given the words found in the amendments. It is not easy and perhaps it is impossible to give a full and comprehensive meaning to every word in the amendments and at the same time avoid friction and bring about complete harmony between them. One section should not be so interpreted as to give some meaning to it and no meaning to the other or some part of it.

3. While we must endeavor to ascertain the intention of the people, as expressed in the Constitution, yet to the extent that attributes of sovereignty are granted to local subdivisions the language carrying the grant should be strictly construed for the reason that such grant is a limitation upon the power of the legislature (*Thurber v. McMinnville*, 63 Or. 410, 414 (128 Pac. 43)); and the statement of this rule together with the contention made by plaintiff that the 1901 charter should be strictly construed, suggest the observation that to construe a Constitution, for the purpose of ascertaining whether under it a power can be or is granted, is not the same thing as construing a charter, when it is conceded that a power can be constitutionally conferred and the only inquiry is whether it has in fact been granted. Governed by these rules of construction, an attempt will be made to discover whether either or both amendments to the Constitution have conferred upon ports the right to amend their own charters.

4. Turning to the quotation from Article XI, Section 2, it will be observed that it contains three sentences.

The first sentence relates to the creation of corporations and it contains an express permission coupled with an express prohibition. The permission allows the legislature to pass general laws under which all kinds of corporations may be formed; and the prohibition prevents the legislature from creating any kind of a corporation by a special law. The second sentence only applies to a "municipality, city or town." The word "municipality" is either used in a broad sense or else it has a restricted meaning. If the term is comprehensive in its scope, it would include municipalities like ports; but, if the term is to be given a restricted meaning and is used as a synonym for city or town then it would signify a municipality in the nature of a city or town and would not include a port. However, regardless of the scope of the meaning of the word "municipality," the second sentence when speaking of a "municipality, city or town" contains either an express, absolute and unlimited prohibition as to those corporate bodies, or it contains an express but limited prohibition accompanied by an implied permission. If the prohibition is absolute then the legislature not only cannot pass a special law affecting a specific city or town but it cannot enact a general law applying to all municipalities or cities or towns. If, however, the prohibition is limited so as only to prevent the passage of special laws which enact, amend or repeal single charters or acts of incorporation then that limited prohibition necessarily implies a permission to enact general laws. No attempt is yet made to ascertain whether the prohibition contained in this sentence is unlimited or curtailed, for the inquiry still being pursued is whether the port can itself amend its charter. The third sentence contains an express permission and an implied prohibition:

The permission enables cities and towns to enact and amend their municipal charter and at the same time by its silence impliedly excludes every other kind of a corporation. The first sentence relates to the creation of corporations, while the second refers to what cannot be done after a municipality, city or town has been created and the third speaks of what can be done by a city or town after it has come into existence. No word or clause or sentence appearing in this section of the Constitution furnishes the slightest suggestion that any corporate body, other than a city or town, can amend its own charter or act of incorporation. The section may be scrutinized as a whole or dissected sentence by sentence, clause by clause and word by word, and the process may be aided by beguiling sophistry or cunning casuistry or compelling logic and yet it will be utterly impossible to extract a sustainable conclusion that a port can amend its own charter; and, therefore, if the Port of Portland has authority to legislate power to itself that authority must appear in Article IV, Section 1a.

Stated in broad terms the argument is that Article IV, Section 1a grants to every "municipality and district" the initiative and referendum powers "as to all local, special and municipal legislation;" that the disputed amendment of 1912 was municipal legislation; and that therefore the port was empowered to amend its charter.

Since Article IV, Section 1a, speaks of "the initiative and referendum powers reserved to the people by the Constitution" and as the powers referred to are preserved by Article IV, Section 1, it will be necessary to give some notice to the latter section before we can know what is further reserved by the former section.

The constitutional amendment of 1902, known as

Article IV, Section 1, did not deprive the legislature of authority to enact laws but it expressly declares that "the legislative authority of the state shall be vested in a legislative assembly" with a limitation, however, which reserves to the people "power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls an act of the legislative assembly."

The initiative power defined in Article IV, Section 1 means the right of the legal voters of the state at large to initiate and enact laws or amendments to their Constitution. Before this amendment of 1902 the people had delegated their legislative authority to their representatives by a Constitution which declared that "the legislative authority of the state shall be vested in the legislative assembly"; but, by reserving the initiative power the people returned to themselves the right, which they had in the very origin of state government, to legislate. In the beginning, the whole sum of legislative power came from all the people and when they reclaimed the right to legislate they only returned to themselves what they had previously delegated to their representatives and hence no charter is needed to measure the right of the people to legislate, for it is a right which is unfettered except as the people themselves have limited it. The legislative assembly is still retained, however, as the agent of the people and the principals have reserved unto themselves the right to ratify or reject measures passed by their representatives. When the people initiate and adopt a law they do so in the exercise of the initiative and when a measure which has been adopted by the legislature is referred to and acted upon by the people they

have made use of the referendum power. These are the initiative and referendum powers which had been "reserved to the people by the Constitution" and which by Article IV, Section 1a, "are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation;" and it is therefore argued that the entire quantity of power to enact "local, special and municipal legislation" has been subtracted from the aggregate of sovereign legislative authority and set adrift for the use of any and every municipality.

Reasoning by analogy, it is contended that since the total amount of legislative power has been given by the Constitution itself to the people of the state at large, therefore the whole sum of municipal legislative power has likewise been given by the Constitution itself to the people of a municipality and to those of a district, and that nothing more is required to aid the grant made by the Constitution. This contention is equivalent to saying that as to local, special and municipal legislation a municipality or district is just as supreme as are the legal voters of the state as to state-wide legislation, and that therefore no charter is required or, even if it is essential, the legal voters can amend their own charter or act of incorporation without first receiving permission from any other legislative body.

It must be conceded that Article IV, Section 1a, includes cities and towns as well as other municipalities and that cities and towns derive just as much authority from this section as any other municipality, and that therefore if Section 1a dispenses with the need of charters then a city or town can enact municipal legislation to the fullest limit without a charter. This section grants to a port no more power than it con-

fers upon a city but the latter is given just as much and in fact more power than the former. When we turn to Article XI, Section 2, however, we observe that a charter is necessary, and there cities and towns are granted the right to enact or amend their own charter. The grant of power to enact and amend their own charter is only one way of saying that a charter is requisite as a measure of corporate authority because otherwise it would have been enough merely to provide for the creation of a city or town. The very circumstance that provision is made for the amendment of a charter is a recognition of the necessity for the enlargement of a charter before an enlarged municipal power can be exercised. The same persons framed Article XI, Section 2, and Article IV, Section 1a, and they certainly did not intend to say in Article XI, Section 2, that a city must have a charter and in Article IV, Section 1a, that one was not needed. Both sections must be so read as to produce harmony. If Article IV, Section 1a, dispenses with charters then much of Article XI, Section 2, is deadwood; but, if the latter section is construed to mean what it says then a city or town must have a charter just as it was obliged to have one in the past, and the reason of the need for one is that it is an instrument containing the measure of exercisable power. The framers of this amendment recognized the continued need for a city charter. A city is a type of municipal government containing higher attributes of sovereignty than any other local subdivision and consequently the recognition of the necessity of a charter for a city carries with it a like recognition of the need of a charter or instrument of some kind by which to determine the extent to which a municipality or district proposes to enact local, special and municipal legislation. Every

municipality or corporate body must have a charter or grant of power. A municipality only exercises the power granted to it while the people of the state at large exercise all power except as curbed by limitations placed in the Constitution by themselves upon themselves. By the terms of Article XI, Section 2, a city must have a charter and it is inconceivable that Article IV, Section 1a, dispenses with the need of one. If by Article IV, Section 1a, a port needs none then by the same token a city needs none. A city can exercise only such powers as it has incorporated in its charter and a port is not more puissant. The very fact that Article XI, Section 2, provides for enacting or amending a charter after a city or town has been created is of itself only another way of saying that a charter enumerating the powers to be exercised is indispensable; otherwise, it would have been enough simply to provide a procedure by which a group of persons could transform themselves into a city or town and proceed to pass city ordinances. Why amend a charter if a charter is not essential? Somebody answers: Cities and towns have representative bodies called councils and a charter is necessary to limit the authority of those councils. The reply is that this identical Port of Portland at the very time of the adoption of the amendments to the Constitution also had a representative body made up of port commissioners who were and are the equivalent of city councilmen.

To amend a charter is one step and to exercise a charter power by transforming it into an ordinance is another step so that the process has required two steps. Why has the Constitution made provision for two steps if the first step was enough? There is nothing in these two amendments to the Constitution which

will serve as a foundation for the claim that it was intended to do away with charters; but, on the contrary every item of tangible evidence indicates that some law-making authority must take or grant a power before a municipality can exercise it. Had it been the intent to abolish charters Article XI, Section 2, would have contained appropriate or at least some language to indicate that intent instead of employing words which mean nothing unless they assume and imply and therefore signify the continued necessity of a charter which shall now serve the same purposes as before. If we are to preserve the presumption that all the words appearing in both sections were inserted for the purpose of conveying some meaning, then the conclusion is inevitable that Article IV, Section 1a, does not dispense with the necessity of a charter when Article XI, Section 2, recognizes it as a *sine qua non*, and that the former section does not grant the right to enact or amend a charter to every kind of a public corporation when the latter section in direct terms confers the right on cities and towns only, and by every known canon of judicial construction withholds the privilege from every other corporation. Surely, the persons who drafted these two sections of the Constitution did not contemplate that one would conflict with the other nor that one would nullify any portion of the other, especially when each was framed, submitted and adopted as a companion of the other. Both sections recognize the necessity of a charter as the measure of the legislative power to be exercised by corporations and both sections contemplate that no local subdivision of government except cities and towns can appropriate legislative power unto itself.

Proceeding with the contention it is insisted that, even though it be determined that a port must have

a charter, nevertheless, the legal voters of the Port of Portland can amend their own charter and that this power comes from Article IV, Section 1a. Again, attention is directed to the fact that Article IV, Section 1a, embraces cities and towns and every possible power granted to any other corporate body is likewise conferred upon every city and town; and, moreover, this very section extends to cities and towns the right to prescribe the manner in which they shall exercise the initiative and referendum powers, a favor not accorded to any other corporate body. If Article IV, Section 1a, authorizes the legal voters of any kind of a public corporation to enact or amend their own charters, then most of the third sentence of Article XI, Section 2, is a prodigal waste of words and is utterly useless, for the reason that it would be a work of supererogation to say that the legal voters of cities and towns can enact or amend their own charters if that right had been conferred by the former section. Moreover, when Article XI, Section 2, says that the legal voters of cities and towns can enact or amend their charters, it amounts to saying that no other subdivision of government can enact or amend its charter for the reason that the expression of one excludes all the rest. If Article IV, Section 1a, grants to a port the right to legislate unto itself a power to legislate then that section of the Constitution conflicts with Article XI, Section 2. It is unreasonable to suppose that it was intended that one section would give to all what another section only gives to some, or that one would grant what another withholds for this would result in conflict instead of harmony, and harmony is the "consummation devoutly to be wished." No subdivision of government like a port or district can exercise power unless that power is first granted by some

lawmakers authorized to legislate that power to the municipality or district. The Constitution enables the legal voters of cities and towns to enact or amend their charter, but does not permit the legal voters of any other municipality or district to enact or amend their charter or act of incorporation without outside legislative aid.

5. It is next claimed in behalf of the port that if its voters cannot amend their own charter then for all practical purposes the corporate body will be stunted and it cannot grow for the reason that the legislature is prohibited from amending the charter and it is not feasible to call upon all the voters of the state for an enlarged charter or act of incorporation. It must be conceded that it is not at all probable that either the framers of any part of the Constitution or the people of the state ever intended to confine the right of amending port charters exclusively to the voters of the state at large, and hence we now inquire whether the legislature is absolutely prohibited from passing either a general or a special law which amends or affects charters or acts of incorporation of ports.

If the legislature is prohibited from passing measures which may operate as amendments to charters the prohibition cannot be found in Article IV, Section 1a. Viewing this section by itself, not a word can be found which intimates that the legislature is powerless to pass measures affecting charters. • It is true that Section 1a further reserves the initiative and referendum powers, and the powers referred to are the ones which had been previously reserved to the legal voters of the state. The powers reserved to the legal voters of the state do not abolish the legislature nor preclude it from enacting laws but on the contrary “the legislative authority of the state shall be vested in a legis-

lative assembly," although the people have reserved the right to initiate their own laws or to refer measures passed by the legislature. The word "referendum" of itself implies the existence of a law-making body other than the legal voters. If it be contended that Section 1a does not prevent the people of the state at large from amending charters but that it does prohibit the legislative assembly, then the answer is: that this section, standing alone, is equally devoid of prohibition against the legislature as it is against the voters of the state at large; and, therefore, if this section confers municipal supremacy upon the municipality itself then that supremacy is as complete over the voters of the state at large as it is over the legislative assembly in which the legislative authority of the state is vested. However, no person has ever argued or even suggested that the legal voters of the state are prohibited by Section 1a from passing laws amending municipal charters. If Article IV, Section 1a, presents no obstacle to the voters of the state at large it offers no resistance to action by the legislature; and, consequently, there is no impediment to municipal law-making unless Article XI, Section 2, is an obstacle.

The examination of Article XI, Section 2, with a view of ascertaining the extent of the prohibition imposed upon the legislative assembly carries us into a field of contention and debate. While the words found in the amendment cannot be controlled by any extraneous language, whether appearing in the ballot title or in the argument which accompanied the tentative draft, or elsewhere, nevertheless, it may be of some interest first to give an account of the genesis of the amendment and possibly this recital together with the words of the ballot title will throw some light upon the

doubtful language which has produced so much controversy about the construction to be placed upon Article XI, Section 2.

On September 6, 1906, a circular letter accompanied by a tentative draft of a proposed amendment to Article XI, Section 2, and a like draft of what is now Article IV, Section 1a, was mailed "to more than a thousand representative citizens of Oregon to get their opinion on the wisdom of trying to submit the inclosed suggested constitutional amendments." The letter avowed that it was the purpose of the signers to "try to form an organization of four hundred or five hundred citizens to present such of these measures as may be agreed upon" and closed with a request for a reply to W. S. U'Ren. The names of 17 persons with that of Thomas A. McBride, who is now the Chief Justice of this court, heading the list, appear as the signers and authors of the letter. Subsequently the persons who were promoting the proposed constitutional amendments formed an organization known as the People's Power League of Oregon with four officers and an executive committee of 21 persons including Thomas A. McBride.

The tentative draft of the proposed amendment to Article XI, Section 2, was substantially the same and almost identical in terms with Senate Joint Resolution No. 3, which was adopted by the legislative assembly in 1901 and again in 1903 (Laws 1901, p. 471; Laws 1903, p. 346); and accompanying that tentative draft was an argument which is here quoted for the reason that it fully explains the real purpose of the amendment:

"The usual method of making city charters in the past has been, in this state, for a few men to agree on the charter they wanted for the city. Then it was introduced in the legislative assembly by one of their

county members. It was referred to a committee consisting of the members from his county, reported favorably, of course, and enacted by unanimous consent of the legislature. No other member ever sees or cares anything about it. The only exception in Oregon to this method is the charter under which Portland is governed, and which seems to be the most satisfactory the city ever had. This was drafted by a committee of citizens and approved by the people at an election, after which it was enacted by the legislature. But the action of the legislature is a needless formality. Of what interest are the local laws of Portland to farmers of Klamath County, or the charter or ordinances of Lakeview to the fishermen of the Columbia River? This amendment is another step towards home rule in home affairs. If it is enacted it will not only relieve the legislature of a great deal of useless labor, but it will place the power to make the city laws in the hands of the people who have to obey them."

An examination of the public prints issued at that time discloses that the idea which was uppermost in the minds of all was to take from the legislature the power to make a charter for a city or town by a *special* law. The evil sought to be removed was the making of a single charter for a single city by a few men who agreed "on the charter they wanted for the city." The suggestion was nowhere made that evils were necessarily involved in the enactment of general laws which affected all the cities and towns alike. Indeed, comparatively few general municipal laws had been passed; and it is a noteworthy fact that most of the general municipal legislation was admittedly meritorious, for example, the Bancroft bonding act. While the farmers of Klamath County might not be interested in a law which applied only to Portland and the Columbia River fishermen might not be concerned in the charter or ordinances of Lakeview, yet, both the

Klamath County farmers and the Columbia River fishermen might be vitally interested in a general law which expressed a state-wide policy concerning municipalities, and that interest might be just as vital as their interest in a law affecting all road districts, or all school districts or all counties.

The tentative draft of Article IV, Section 1a, was also accompanied by an argument which is devoted mainly to a consideration of the referendum against single items and sections of appropriation bills and concludes with a single sentence that is applicable to the desirability of referring municipal legislation and reads thus:

“The adoption of this amendment will give the people power to control salaries of county and district officers.”

After making changes, the tentative drafts finally crystallized into forms which were satisfactory to the People's Power League of Oregon and that organization then caused initiative petitions to be circulated and, on February 3, 1906, completed initiative petitions were filed in the office of the Secretary of State requiring that both proposed measures be placed upon the ballots to be cast at the ensuing general election. At the time of the submission of the proposed amendments it was not the specific duty of the Attorney General, as it is now, to prepare the ballot titles for initiated or referred measures, and consequently the ballot title for Article XI, Section 2, was prepared by a quorum of the executive committee of the People's Power League of Oregon and filed with the Secretary of State who caused the ballot title to be printed, as it was submitted to him, thus: “Constitutional amendment giving cities and towns exclusive power to enact and amend their charters.”

Having given an account of the origin and evolution of the amendment, we are enabled to attempt to ascertain the construction to be placed upon Article XI, Section 2. It will be recalled that it was suggested that the word "municipality" employed in the second sentence is used either in a comprehensive or else in a restricted sense. If it is to be given its broadest signification it will include a port; but, if it is narrowed it only means a municipality like a city or town and in that event the prohibition in the second sentence would only prevent the legislative assembly from enacting, amending or repealing any charter or act of incorporation for any city or town or municipality in the nature of a city or town. The ballot title offers the suggestion that the word "municipality" was used merely as a synonym for "city or town", for the ballot title uses the words "cities and towns" and nowhere employs the word "municipality"; and, moreover, this suggestion finds some corroboration in the circumstance that only cities and towns are mentioned in the third sentence. If it was intended to lay a prohibition on the legislature as to cities and towns and also on another sort of "municipality" why did not the next sentence, which grants a permission, include that other kind of a "municipality" in the permission? If the word "municipality" as here used includes a port it also includes a county because Article XI, Section 9, speaks of "county, city, town or other municipal corporation." If a port and county are not included within the prohibition of the second sentence then the legislature can pass a special law amending a port charter or affecting a single county; but if a county and a port are within the embrace of that sentence, then the legislature cannot single out a county and pass a law which is special

as to such county, and the result will be that, by an actual count, 125 statutes passed by the legislature since 1906 are indubitably void, 34 more are probably void and about 25 others are possibly void. Considered as an *ad hominem* argument the probable consequences of a different interpretation are sufficient to justify a resolving of a doubt in favor of a construction which holds that the word "municipality" is only used in the second sentence of Article XI, Section 2, as a synonym for city or town. However, it is not necessary to rest this conclusion upon the doctrine of consequences for the reason that every sign found in the amendment itself, as well as all the evidence afforded by the argument made by its framers and the ballot title prepared by them, points with unerring certainty to the conclusion that cities and towns were municipalities which were uppermost in the minds of those who framed this amendment and the word "municipality" was only used as a synonym for city or town. This construction does not place ports and counties and similar municipalities in a position where the legislature can exercise an arbitrary authority over them. The second sentence does not prohibit the legislature from passing a law applying only to one port for the reason that a port is not within the prohibition of the second sentence of Article XI, Section 2; such statute when passed is a grant of power and becomes available to the port; the enactment is municipal because it appertains to a municipality, and it is also local and special, for the reason that other ports are not included; and the measure being municipal and also local and special the people of the port can refer that special, local and municipal legislation to themselves and approve or reject the measure.

This construction recognizes that legislative authority is vested in the legislative assembly as declared by the Constitution and at the same time it executes the natural meaning conveyed by the language found in Article IV, Section 1a, where it is said that the referendum power is reserved "as to all local, special and municipal legislation," and responds to the argument advanced by the framers of Section 1a which is again quoted:

"The adoption of this amendment will give the people power to control salaries of county and district officers."

Assuming, however, that the word "municipality" is used in its comprehensive sense and embraces a port, we are at once carried into the still controverted question of whether the legislature is prohibited from enacting a general law affecting municipalities. If the words found in the ballot title are divorced from all other considerations, whether essential and omnipresent or immaterial and transient, then some evidence is found to support the contention that the prohibition precludes the passage of a general as well as a special law, for the language of the ballot title prepared by the executive committee of the People's Power League of Oregon is: "Constitutional amendment giving cities and towns exclusive power to enact and amend their charters." Even though it be conceded that any weight can be attached to the wording of the ballot title, nevertheless, it must be considered in connection with the amendment itself; and although the word "exclusive" is employed, yet, no person contends that the power to amend charters has been lodged with those municipalities to the exclusion of every other law-making authority. It could not literally be true that a city has exclusive power to enact and

amend its charter if the power to do the same thing also resides elsewhere. That the legal voters of the state at large can adopt either a special or a general law, enacting or amending or even repealing city and other municipal charters and acts of incorporation, is acknowledged by all persons. No one has undertaken to argue that all the people cannot pass a general or a special law affecting charters; and, therefore, if the power to enact or amend municipal charters is granted to voters of the municipality and at the same time the same identical power is exercisable by the legal voters of the state at large, it necessarily follows that the power of the city or town is not exclusive.

The fact that the right of the legal voters of cities and towns to enact or amend their charters is "subject to the Constitution and criminal laws of the State of Oregon," involves the suggested implication that the right is not subject to any laws except criminal laws and this is a strong circumstance in support of the theory that the legislature cannot enact a general law affecting the charter or act of incorporation for any municipality, city or town.

The word "any" has played an important role in some of the prior discussions, the argument being that the term "any" means "all" and is equivalent to saying that the legislature must keep its hands off every charter and every act of incorporation of every municipality, city and town. Omitting the word "any" there is not even one word indicating the plural number in the second sentence of Article XI, Section 2. The sentence is not "any and every charter"; it is not: "any charters"; it is not: "any or every charter"; nor is it: "any or all charters." Omitting the word "any", every word is used in the singular number and unless the word "any" gives a

plural meaning to words which otherwise would mean singleness, then this second sentence does not prohibit the legislature from passing a general law amending the charters or acts of incorporation of ports, or even cities and towns. It is true that the word "any" may sometimes signify every or all, because like all other general words it is oftentimes limited by the context or subject matter. Primarily "any" means: "One indifferently out of a number." Webster's Dictionary. See also Soule's English Synonyms. "*Any*," is a derivative of "*one*," "or rather of its weakened form '*an*,' '*a*,' in an indeterminate unitary or, in plural, partitive use. * * In the singular, one, a or an, some; in the plural, some; indeterminately distributed, implying unlimited choice as to the particular unit,"—and signifies "an indeterminate unit or number of units out of many or all." Century Dictionary. Applying the word in its etymological sense the second sentence is only one way of saying that the legislature cannot select one city or town and pass a law enacting or amending or repealing *the* charter of that one city or town; nor can the legislature select *some* cities or towns and pass a law which enacts, amends or repeals *the* charters of only *those* cities or towns. A multitude of judicial precedents give support to the interpretation now placed upon the word "any". 3 C. J. 231.

Reverting to the evil which the amendment was designed to remove, it will be recalled that the objection voiced by the argument, which the framers of this amendment submitted with the tentative draft, was that city and town charters were being passed by the legislature for single cities and towns under circumstances which in the final analysis made the charter ostensibly the legislative act of all but really the legis-

lative act of only two or merely a few members of the legislature. The theme for all the pamphlets and newspaper editorials discussing Article XI, Section 2, was the desirability of preventing the legislature from passing a charter for a city when none of the legislators, except those from the county in which the city was located, knew or even cared anything about the charter either before or after its passage. Neither the evil nor the objection included general laws appertaining to all cities and towns. The grievance was centered upon and confined to special acts passed for single cities. The idea which was uppermost in the minds of all persons was to prevent the legislature from enacting or amending a charter for a specified city; and the constant presence of this idea dominated the language employed by the framers of the amendment and it was only natural for them to express this dominating idea by using the word "exclusive" in the ballot title and the term "any" in the body of the amendment; and, therefore, the words signify that as between the legislature and the legal voters of a city, the latter are given the exclusive right to enact or amend a charter for their individual city. It is admitted on all hands that the ballot title is not literally correct for the reason that all persons concede that the voters of the state at large can enact or amend or repeal a single charter. The word "exclusive" may, however, be presumed to have been used to express some idea of exclusiveness, and the idea intended to be expressed was plainly the one which was uppermost in the minds of those who wrote the ballot title: a purpose to empower the people of a city or town to enact or amend their charter and to exclude the right of the legislature to affect *that* charter by a special law. The legislature has the right to pass a general

law concerning municipalities, cities and towns; the right is contained in the Constitution; and therefore when the legal voters of a city or town enact or amend a charter they do so subject to the right of the legislature to pass a general law because their right to enact or amend their charter must be exercised "subject to the Constitution."

The interpretation which gives to the word "any" the meaning of *oneness* as distinguished from *allness* is further supported and strengthened by the language used in the companion amendment, Article IV, Section 1a. Before noticing the twin section more minutely, let us remind ourselves that it is fair to assume that Section 1a was drawn with reference to the variant internal governmental organisms found in the different forms of municipalities and districts. A city or town had within itself its own representative body exercising law-making powers; some other forms of local government, for example ports, possessed an analogous internal legislative body; and while the remaining municipalities and districts had their representatives yet those representatives were only empowered to transact business and had no authority to make municipal laws. Again quoting from Article IV, Section 1a, it will be observed that the initiative and referendum powers are further reserved to the legal voters of every municipality and district "as to all local, special *and* municipal legislation, of every character, *in* or *for* their *respective* municipalities and districts." At this point we direct attention to the fact that the initiative petition filed with the Secretary of State does not have a comma after the word "special" and consequently it was erroneous to insert a comma after the word "special" when Article IV, Section 1a, was carried into Lord's Oregon

Laws. It was appropriate to use the word "*in*" in order to embrace legislation by internal law-making bodies. Moreover, the language is not "*in and for*" but it is "*in or for*." The word "*for*" was an appropriate term to indicate legislation by a law-making body existing outside the municipality. There were only two methods by which legislation could be enacted outside the municipality: (1) The people of the state at large; and (2) the legislative assembly. The term "*referendum*" necessarily assumes the existence of a law-making body other than the voters themselves; and, hence when a municipal law is *enacted in* the municipality it can be referred, and when a municipal law is enacted by the legislative assembly *for* one municipality like a county or port, it can likewise be referred. Again noticing the wording of Section 1a, it will be seen that the language is "*local, special and municipal legislation*" and not "*local, or special or municipal legislation*." When a city council or other internal representative body of a municipality enacts a law or when the legal voters of a city pass a measure, it is necessarily local and special to itself and is municipal in quality, because such a law-making body could not enact any other character of legislation. So too, when the legislature enacts a law for only one municipality, that law is special and local because in direct terms it is applicable only to a specified municipality and is of course municipal in character because appertaining to a municipality. Granting the right to exercise the initiative and referendum as to "*all local, special and municipal legislation*" is equivalent to saying that those powers cannot be applied to legislation which is not "*local, special and municipal*." It is not enough that the legislation be municipal in character but it must also be local and special; and

therefore the very language of Section 1a contemplates not only that the legislature can enact municipal legislation but also that the legal voters of one municipality cannot invoke the referendum to determine whether they shall be governed by a general law which has been passed for all municipalities.

This result does not emasculate the power of cities and towns to enact or amend their own charters. Take for example the Bancroft bonding act and assume that it had been passed by the legislature to-day: It would apply to all the cities and towns in the state and would be available to all the people of the respective cities and towns. To-morrow, however, the city could legislate concurrently upon the same subject and make use of its legislation if the city legislation did not conflict with the state legislation. If the legislature passes a general municipal measure it can be referred to the voters of the entire state the same as any other general legislation, but it is safe to say that in the practical administration of affairs legislators will be extremely tender of the rights and the wishes of cities and towns. The legislature cannot pass a special law for a city or town; but it can enact local, special and municipal legislation for any other kind of a municipality or district subject, however, to the right of the legal voters of such municipality or district to refer the measure to themselves for their approval or disapproval. A painstaking investigation by every member of the court confirms our belief in the correctness of the conclusion that the legislature can enact general laws concerning cities and towns and other municipalities. A construction of the Constitution which enables the legislature to pass a general law relating to cities and towns harmonizes the different sections and makes the organic law consis-

tent with itself. To hold that the legislature cannot pass a general law affecting municipalities will not only jeopardize all bonds that may have been issued pursuant to Chapter 128, Laws of 1907 (codified in Sections 3254 to 3263, inclusive), but improvement bonds issued by cities and towns since 1907 under the provisions of the Bancroft bonding act may be rendered doubtful to whatever extent they may be dependent for their legality upon the validity of the amendment enacted by the legislative assembly in 1907 (Chapter 201, Laws 1907); and let it be remembered that since 1907 the City of Portland alone has issued bonds under the Bancroft bonding act amounting to approximately \$4,000,000.

Speaking for himself the writer says that: had any doubt remained after an extended examination of the subject it would be clarified and entirely removed by the declaration of Mr. Chief Justice McBRIDE who says that the sponsors for the amendments neither intended nor thought nor even dreamed that the amendments would prohibit the legislature from enacting general laws relating to municipalities, cities and towns. He assisted in launching the movement to amend the Constitution; his guidance was sought and his counsel was followed by his coadjutors; he knew the object designed to be accomplished; and no living person more than he is in a position to speak understandingly of the intention sought to be expressed by the language employed, for the reason that he helped to frame both amendments. "He who made the law knows best how it ought to be interpreted" is not less true now than it was when Rousseau wrote.

Summarizing the foregoing discussion: The legislative assembly cannot *create* any corporation by a special law; but corporations of all kinds may be

formed under appropriate general laws passed by the legislative assembly. Charters or laws granting or enumerating the powers exercisable by a corporation are indispensable. Cities and towns can enact or amend their own charters, but no other corporate body can, without an enabling act, legislate power unto itself to legislate. The legislative assembly cannot enact a special measure which enacts, amends or repeals a specified city or town charter, but it can enact a special law which amends the charter or act of incorporation of a municipality, other than a city or town. The legislative assembly can enact a general law affecting the charters or acts of incorporation of all cities or towns, or municipalities or districts. If a municipality has within itself a representative law-making body then the legal voters of such municipality can apply the referendum to any measure passed by that representative body; if the legislative assembly passes a special measure for a specified municipality or district, other than a city or town, then the legal voters of that municipality can apply the referendum to that special measure for the reason that this gives practical application to Article IV, Section 1a, which reserves the referendum "as to all local, special and municipal legislation of every character *in* or *for* their *respective* municipalities," and also carries into execution the purpose expressed in the argument submitted by the framers of the amendment to the Constitution. The people of the state at large can apply the referendum to all general municipal legislation but the legal voters of an individual municipality cannot refer to themselves, as distinguished from the voters of the state at large, any general municipal measure passed by the legislative assembly.

The construction adopted here removes friction between the two amendments, promotes harmony between them, makes them consistent with each other and with themselves and with the Constitution as a whole, and above all carries out and preserves the idea of home rule without at the same time creating an *imperium in imperio* or denying the power of legislation to the sovereign people of the state at large or their agent and representative, the legislative assembly where, in the words of the Constitution itself, "the legislative authority of the state shall be vested." The amendments were innovations at the time of their adoption and their newness made it difficult to understand their full scope and meaning; what was then theory has since become practice, and what to some may once have appeared apocryphal has now become familiar and accepted usage, so that now the language of the amendments is shown in the clearer light of practical experience, rendering it less difficult to interpret the amendments and enabling all readers to see plainly what was then clear to the writers of these changes in the Constitution.

6, 7. The doctrine taught by *Farrell v. Port of Portland*, 52 Or. 582 (98 Pac. 145), was overruled by *State ex rel. v. Port of Astoria*, 79 Or. 1 (154 Pac. 399), and counsel have expressed some apprehension lest the Port of Portland is now prohibited from continuing in the pilotage and towage business. We merely call attention first to 23 Cyc. 1269 where it is stated that:

"A judgment for or against a municipal corporation, in a suit concerning a matter which is of general interest to all the citizens or taxpayers thereof, as the levy and collection of taxes, or public contracts or other obligations, or public property, its title, character or boundaries, is binding, not only on the municipality and its officers, but also upon such citizens or

taxpayers, in so far as concerns their rights or interests as members of the general public, although not in respect to rights which they hold as individuals, peculiar to themselves and not shared with the public. And subject to similar limitations, a judgment between certain residents or taxpayers and the municipality may be conclusive on all other citizens similarly situated."

And then we point to 23 Cyc. 1221, where we read that:

"The decision of an appellate court is binding and conclusive upon the parties, as to the matter or point adjudged, in subsequent litigation between them in the same or any other court, and this is true even though the appellate court has since decided differently in other cases."

The interveners contend that when they made their investments they did so relying on the power of the legal voters to amend their own charter as ruled in *Farrell v. Port of Portland*, 52 Or. 582 (98 Pac. 145). No court ruled that the port must dredge Oregon Slough or that the interveners could themselves compel the improvement. The right to do and the right to compel to do are not identical. If, after some court has held that a city can improve streets, a person buys a city lot relying on the city to pave the street in front of his property that court decision plus the purchase of the lot do not enable the property owner to compel the city to lay pavement on the street in front of his lot.

All the parties to this suit agree that it is essential to the development and welfare of the Port of Portland that it be granted power to improve Oregon Slough. The legislative assembly is now in session and has ample authority to grant the desired power to the Port of Portland.

The decree of the Circuit Court is reversed and the cause is remanded for such further proceedings as are not inconsistent with this opinion.

REVERSED AND REMANDED.

Argued December 20, 1916, reversed January 16, 1917.

STEVENSON v. PORT OF PORTLAND.*

(162 Pac. 509.)

Municipal Corporations—Port—Powers—Coaling Ships—Statutes.

1. Laws of 1901, page 417, reproduced in Sections 6076-6105, L. O. L., Revised Laws of 1891, page 791, establishing and incorporating the Port of Portland, and declared the object of the port to be "to promote the maritime shipping and commercial interests of the Port of Portland," provided for the improvement of certain rivers in the port, and between it and the sea, by a ship canal to the sea, and conferred the right of eminent domain, taxation and the right to make regulations, and to own and operate a dry-dock. In 1908 the legal voters initiated and adopted a measure, attempting to confer the additional power of coaling or bunkering ships, under which the port proposed to purchase a site, erect coal-bunkers, and maintain a supply of coal, the expenses of which were to be raised by taxes, to meet the competition of Puget Sound ports, where coal could be obtained for less than in Portland, and thereby overcome such disadvantage and retain and increase its ocean commerce. *Held*, in view of the object of such legislation, that the coaling or bunkering of ships would be incidental to the public purpose for which the port was created, and would be itself a public purpose, which might be conferred by the legislature.

Taxation—Private Purpose.

2. No tax can be imposed for a private purpose.

Taxation—Subject—"Public Purpose."

3. The "public purpose" for which the government may levy taxes is one which concerns its own people, and not some other people having a government of its own, for whose wants taxes are laid, and must pertain to the sovereignty with which the tax originates; the

*On the right of municipal corporation to engage in private enterprise generally regarded as of private character, see note in 31 L. R. A. (N. S.) 119.

For authorities passing on the question as to what are public purposes for which money may be raised by taxation, see note in 14 L. R. A. 474.

essential requisite being that a public service or use shall affect the inhabitants as a community, and not merely as individuals.

[As to purposes for which a municipal corporation may levy taxes and assessments, see note in 16 Am. St. Rep. 365.]

Taxation—Public Purpose—Custom and Usage.

4. Custom and usage may be important factors in determining whether a tax is for a public or private purpose; but, while recognizing the influence of customs and usages already established, the courts are mindful of the fact that new customs and usages may prevail, and that conditions may change, so that a purpose, formerly private, may become public.

Municipal Corporations—Port—Powers—Amendment to Charter—Coaling Ships.

5. Under Laws of 1901, page 417, reproduced in Sections 6076-6105, L. O. L., revising Laws of 1891, page 791, incorporating the municipality of the Port of Portland without the right to coal ships, the voters thereof could not, without legislative aid, constitutionally initiate and adopt a measure authorizing the port to coal ships.

From Multnomah: GEORGE N. DAVIS, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

This is a suit by John H. Stevenson against the Port of Portland, a municipal corporation, and R. D. Inman, J. W. Shaver, D. C. O'Reilly, A. L. Pease, W. H. Patterson, E. W. Spencer and Alfred Tucker, board of commissioners. The facts are as follows:

The Port of Portland plans to erect and maintain coal-bunkers and to supply ships with coal; and the plaintiff, who is a taxpayer, sued to enjoin the defendant from carrying out its plans. The trial court dismissed the suit when the plaintiff declined to plead further after a demurrer to the answer had been overruled, and consequently the appeal presents a record consisting only of a complaint and answer. The complaint alleges that the venture about to be entered into by the port is private in its nature, and that therefore moneys collected by taxation and used in supplying coal to ships would be used for a private, and not a public, purpose.

The answer avers that the defendant was organized for the purpose of promoting the maritime shipping and commercial interests of the Port of Portland, and, to accomplish that general purpose, it is empowered to coal ships. The pleading alleges that the early growth of the Port of Portland occurred during a time when most of the water transportation was done by sailing vessels, but of late years they have been more and more displaced by steamships, so that now by far the greater part of the sea-going trade is done with steamships, which, other conditions being equal, naturally seek those ports where suitable bunker coal can be obtained most readily and most cheaply. Continuing, the answer alleges:

“No suitable bunker coal is produced by any mines in the vicinity of Portland. A somewhat inferior grade of bunker coal is produced on the Puget Sound, and some of it is furnished to steamers entering Puget Sound ports, but the best bunker coal produced on the North Pacific Coast comes from the north coast of Vancouver Island, British Columbia, and one of the best grades of this Vancouver coal is known as Comox coal. This Comox coal can be purchased at the Comox mines at an average price of \$4.25 per ton, and it is sold to steamers at Puget Sound ports at an average price of \$4.75 a ton, which enables steamers of Puget Sound ports to obtain this coal at an average price of \$1.00 or \$1.50 a ton less than they can obtain it in the Port of Portland, when they can obtain it at all in the last-mentioned port, and there are many times when in the Port of Portland there is no Comox coal or any other suitable bunker coal on the market at all. Under the existing conditions a steamer coming to the Port of Portland, whether a tramp or a regular liner, has to either pay an extra price for coal here, or proceed to the north coast of Vancouver Island to fill her bunkers there with suitable coal at a reasonable price.”

The defendant says that competing ports have been increasing their ocean trade while the business of the Port of Portland has been diminishing, and that this condition will continue to exist and the present disadvantage to the defendant cannot be remedied unless it is permitted to supply ships entering this port with good bunker coal at the same price similar coal is furnished on Puget Sound. The Port of Portland "has spent years of effort and millions of dollars in dredging a channel from Portland to the sea, and that channel is now better than it has ever been before, and has 30 feet of water in its shallowest part; and yet these fine facilities for commerce are not bearing the fruits that they should, and the tremendous investment therein is in danger of depreciation because of the successful competition of the Puget Sound ports, one of the elements of which is their more favorable coaling facilities, as above described."

REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. M. E. Crumpacker*.

For respondents there was a brief over the name of *Messrs. Wood, Montague, Hunt & Cookingham*, with oral arguments by *Mr. Erskine Wood* and *Mr. Richard W. Montague*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The plaintiff contends that when the Port of Portland supplies vessels with coal, it conducts a private competitive business, while the defendant argues that under all the surrounding circumstances it accomplishes a public rather than a private purpose when

it furnishes coal to steamships. The Port of Portland is not claiming that it has a right to exist for the sole purpose of selling coal as a business, but it does insist that there is no constitutional inhibition against granting power to it to furnish coal to ships when that power is considered in connection with the object for which the port was created. In view of the position taken by the defendant, it becomes necessary to refer to the history of the creation and development of the port as we read it in the complaint and answer and in the various legislative enactments.

The Port of Portland was established and incorporated in 1891 by an act of the legislative assembly, in order to provide for the improvement of the Willamette and Columbia Rivers in the port and between the port and the sea, the declared object being to make and maintain a ship channel to the sea of not less than 25 feet in depth: Laws 1891, p. 791. So far as necessary to carry out the object of the corporation, the port was granted full control of the rivers "so far and to the full extent that this state can grant the same," was empowered to exercise the right of eminent domain to do whatever "may be found necessary or convenient in creating or maintaining the channel" at a depth of 25 feet, and to levy and collect taxes upon all taxable property within its boundaries. In 1899 the authority of the port was enlarged, so that among other things it could make certain rules and regulations: Laws 1899, p. 146. All prior legislation was supplanted by the legislative act of 1901 found on page 417, Laws of 1901, and reproduced in Sections 6076 to 6105, L. O. L., inclusive. By this enactment it is declared that the object of the port is "to promote the maritime shipping and commercial interests of the Port of Portland," the authority of the defendant was

again enlarged, and in addition to the rights conferred upon it by previous legislation it was granted other powers among which was the right to erect, own and operate a dry dock, and adequate provision was made for the levying of taxes to defray the expense of the drydock, dredges and work done by the port. In 1908 the legal voters of the port initiated and adopted a measure which provided for the operation of steam tugboats and steam and sail pilot boats, and in 1912 the voters initiated, and a majority voted for, a proposed amendment, which attempts to confer the added power of furnishing ships with coal.

The ultimate aim of all the legislation which has been enacted concerning the Port of Portland is to promote the maritime shipping and commercial interests of the port within whose boundaries is located the City of Portland, the metropolis of the state, and this aim is accomplished by maintaining a ship channel of sufficient depth between Portland and the sea so that ocean-going vessels may enter and discharge cargoes brought from other ports and here receive the grain and timber which contribute in such large measure to the welfare, happiness and prosperity, not only of the Port of Portland, but also of the entire state. The maintenance of an adequate ship channel from Portland to the sea is necessary for the continued well-being of the Port of Portland; and, moreover, a failure to maintain an open channel for sea-going vessels would directly or indirectly affect the entire state. A mere statement of the objects for which the corporation was organized is a demonstration of the fact that it was created for a public purpose. Indeed, the plaintiff concedes that dredging and maintaining a sufficient waterway to the sea is doing a public work, but he does question the right of the port to sell coal to ships.

2. The defendant proposes to purchase a site and erect coal-bunkers and maintain a supply of suitable coal for sale to ships, and the expenses of the business would necessarily be paid out of funds raised by taxes. No tax can be imposed for a private purpose, and therefore the port cannot engage in selling coal to ships unless it is promoting a public purpose: *People v. Salem*, 20 Mich. 452, 474 (4 Am. Rep. 400); *Loan Assn. v. Topeka*, 20 Wall. 655 (22 L. Ed. 455); *Cooley, Taxation* (2 ed.), 103; 2 Dillon, *Mun. Corp.* 1363; 28 Cyc. 1663; 37 Cyc. 719; Gray, *Lim. of Taxing Power*, § 169.

A clear and definite line of distinction cannot be drawn between purposes of a public and those of a private nature, and it is perhaps impossible to enumerate all the characteristics which distinguish a public from a private purpose: *Cooley, Taxation* (2 ed.), 106; *Opinion of the Justices*, 150 Mass. 592 (24 N. E. 1084, 8 L. R. A. 487); *State ex rel. v. Lynch*, 88 Ohio St. 71 (102 N. E. 670, Ann. Cas. 1914D, 949, 48 L. R. A. (N. S.) 720); *Opinion of the Justices*, 155 Mass. 601 (30 N. E. 1142, 15 L. R. A. 809); *Laughlin v. Portland*, 111 Me. 486 (90 Atl. 318, Ann. Cas. 1916C, 734, 51 L. R. A. (N. S.) 1143).

3. It has been said that the "public purpose" for which a government may levy taxes "is one which concerns its own people, and not some other people having a government of its own, for whose wants taxes are laid"; and "the purpose must, in every instance, pertain to the sovereignty with which the tax originates": *Cooley, Taxation* (2 ed.), 108. Quoting from *Opinion of the Justices*, 150 Mass. 592 (24 N. E. 1084, 8 L. R. A. 487):

"The essential point is that a public service, or use affects the inhabitants 'as a community, and not merely as individuals.' "

The Supreme Court of New York has held that:

“The true test is that which requires that the work should be essentially public, and for the general good of all the inhabitants of the” government or subdivision of government: *Sun Printing Assn. v. Mayor*, 8 App. Div. 230 (40 N. Y. Supp. 607), affirmed in 152 N. Y. 257 (46 N. E. 499, 37 L. R. A. 788).

Judge COOLEY is authority for the statement that:

“The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such when the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide”: Cooley, *Const. Lim.* (6 ed.), p. 655.

The Supreme Court of the United States announced in the much cited case of *Loan Assn. v. Topeka*, 20 Wall. 655 (22 L. Ed. 455), that:

“It is undoubtedly the duty of the legislature which imposes, or authorizes municipalities to impose, a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper

for the maintenance of good government, though this may not be the only criterion of rightful taxation": Gray, Lim. of Taxing Power, § 176; *Union Ice & Coal Co. v. Town of Ruston*, 135 La. 898 (66 South. 262, Ann. Cas. 1916C, 1274, L. R. A. 1915B, 859).

4. Custom and usage may be important factors in determining whether a tax is for a public or private purpose; but, while recognizing the influence of customs and usages already established, the courts are mindful of the fact that new customs may be formed and new usages may prevail, and that conditions may change as time advances, so that a purpose which was concededly private a decade ago may now be public and so, too, those which to-day are admittedly private purposes, to-morrow may be public in their nature: *Sun Printing Assn. v. Mayor*, 8 App. Div. 230 (40 N. Y. Supp. 607); *State ex rel. v. Lynch*, 88 Ohio St. 71 (102 N. E. 670, Ann. Cas. 1914D, 949, 48 L. R. A. (N. S.) 720); *Laughlin v. Portland*, 111 Me. 486 (90 Atl. 318, Ann. Cas. 1916C, 734, 51 L. R. A. (N. S.) 1143); *Holton v. Camilla*, 134 Ga. 560 (68 S. E. 472, 20 Ann. Cas. 199, 31 L. R. A. (N. S.) 116); *State ex rel. Attorney General v. Toledo*, 48 Ohio St. 112 (26 N. E. 1061, 11 L. R. A. 729); 27 Harvard Law Review, 162; 1 Dillon, Mun. Corp. (5 ed.), § 21.

The history of the Port of Portland furnishes an example of material changes wrought within a comparatively few years. When the corporation was created most of the incoming and outgoing ocean trade of Portland was carried in sailing vessels, but now conditions are reversed, and steamships carry the bulk of the commerce. Every power which from time to time has been conferred upon the Port of Portland has been granted in order to further the basal and fundamental objects for which the defendant was created. Cloth-

ing the Port of Portland with the power to sell coal to ships would, under the conditions confronting the defendant, only be granting the right to exercise an additional power in aid and in furtherance of the elemental purposes for which the port exists. The power to sell coal to ships would only be accessorial to the definite public purpose for which the port was created. Exercise of the additional power would tend to preserve the health of the corporate body to the benefit and advantage of all the people within the boundaries of the port, and hence would be so intimately related to the object for which the defendant was created and would be so essential for the future well-being of the port that this added power, when employed in furtherance of the prime object of the defendant, itself takes on the characteristics of a public purpose. Under all the circumstances, the sale of coal to ships would concern all the people of the port; it would affect the inhabitants as a community, and not merely as individuals, and it would be for the general good of all the inhabitants of the port: *The George W. Elder* (D. C.), 159 Fed. 1005; *Farrell v. Port of Portland*, 52 Or. 582, 590 (98 Pac. 145).

Even though the defendant may not be governed by the enactment, it is nevertheless worth noting that the legislature has adjudged that selling coal to ships by ports organized under the general law of 1909 is exercising a power for a public purpose: Laws 1915, p. 62, amending Section 6121, L. O. L.

5. Thus far the inquiry has been directed to a consideration of the question of whether or not the port would be carrying out a private or a public purpose if it exercised the power to sell coal to ships, and it now becomes necessary to ascertain whether the defendant does possess that power. The legislature has

not granted the Port of Portland the right to sell coal; and, moreover, it appears from paragraph 3 of the complaint, and it is admitted by the answer, that the defendant proposes to act under the authority of a purported amendment to the charter or act of incorporation attempted to be passed by the voters of the port at the general election held in November, 1912. The voters of a port, however, cannot, without legislative aid, constitutionally amend their charter or act of incorporation, and since they cannot amend their charter, and neither the legislature nor the people of the whole state have conferred the power to sell coal, the defendant is as yet powerless to engage in that business: *State ex rel. v. Port of Astoria*, 79 Or. 1 (154 Pac. 399); *Rose v. Port of Portland*, *ante*, p. 541 (162 Pac. 498). The legislative assembly possesses ample authority to permit ports to sell coal; and the exercise of that authority, when properly granted, and used in aid of the fundamental objects of a port, is the employment of a power for a public use. The defendant can sell coal to ships whenever the legislature or the voters of the state at large grant that right, but the defendant cannot engage in the coal business until it receives proper authority. The demurrer to the separate defense set forth in the answer should have been sustained. The decree is reversed, and the cause is remanded for such further proceedings as may not be inconsistent with this opinion.

REVERSED AND REMANDED.

Argued November 1, affirmed December 27, 1916, rehearing denied January 23, 1917.

MEYERS v. HOT LAKE SANATORIUM CO.*

(161 Pac. 697.)

Appeal and Error—Appellant—Assignee.

1. Section 27, L. O. L., requiring every action to be prosecuted in the name of the real party in interest, Section 38, providing that no action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive, and Section 549, providing that any party to a judgment or decree other than one given by confession or for want of an answer may appeal therefrom, when construed *in pari materia*, do not require a substitution in any case except the death of a party, and under them an assignee, to whom a party has assigned his interest in the property affected by the decree subsequent to its rendition, can appeal from the decree in the name of his assignor.

Appeal and Error—Harmless Error—Pleading—Technical Error.

2. In a suit to foreclose a trust deed which provided that, after default, the trustee might institute foreclosure proceedings when requested to do so by the holders of at least one half the outstanding bonds secured thereby, a technical error in the complaint, in stating that a majority of the holders of one half the outstanding bonds had requested the trustee to act, which error was not made a ground of demurrer and was not called to the lower court's attention so that it might be corrected by amendment, does not require a reversal of the decree rendered after a demurrer had been overruled.

[As to right of action of individual holder on corporate bond or coupon secured by mortgage, see note in Ann. Cas. 1915D, 981.]

Appeal and Error—Presenting Questions Below—Necessity—Omission of Material Averment from Complaint.

3. Where the complaint omits a material averment, a decree for complainant will be reversed, though the omission was not called to the lower court's attention by the demurrer.

Corporations—Trust Deed—Construction—Right to Foreclose.

4. A trust deed, securing corporate bonds, one article of which authorized the trustee to institute foreclosure proceedings when any default in the payment of interest or principal should continue for six months and another article of which provided that in case of default in the payment of interest or any of the principal, the trustee might, at the request of the holder of one half the outstanding bonds, declare the entire amount of the bonds due, and authorized the holders of a majority of the bonds to compel the trustee to so declare or to waive the exercise of the power, or to annul its exercise and to direct the trustee to dismiss any suit begun by it, authorizes the

*On extent to which bondholders are represented by trustee in mortgage or deed of trust securing bonds, see note in 16 L. E. A. (N. S.) 1006.

trustee to institute foreclosure proceedings before the default in the payment of interest had continued six months, if requested to do so by the holders of a majority of the bonds.

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by F. L. Meyers, as trustee, in which the complaint was filed January 7, 1916, to foreclose a deed of real and personal property executed by the defendant, the Hot Lake Sanatorium Company, a corporation, to the Eastern Oregon Trust & Savings Bank, a corporation, as trustee, to secure the payment of that defendant's first mortgage bonds in the sum of \$250,000, issued March 20, 1906, maturing in 20 years and bearing 6 per cent interest, payable on the first days of March and September annually, and evidenced by coupons attached to the bonds. The complaint alleges the execution of the bonds and deed, makes copies thereof a part of that pleading, and avers that default was made with respect to the installment of interest maturing September 1, 1915; that the plaintiff is the successor in interest of the original trustee; sets forth the facts by which he asserts the right to maintain the suit at the time it was instituted; and alleges that each of the defendants, the Hot Lake Home & Sanatorium Company, the Clark-Woodward Drug Company, and the Boise Cold Storage Company, corporations, has or claims some interest in the mortgaged property, but that the right of either is inferior to the plaintiff's lien.

The Boise Cold Storage Company demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of suit. The demurrer was overruled, and, that defendant declining further to plead and waiving the time allowed for that pur-

pose, a decree was rendered as prayed for in the complaint, and the Boise Cold Storage Company appeals.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Edward J. Brazell* and *Mr. Guy G. Willis*, with an oral argument by *Mr. Brazell*.

For respondent there was a brief over the name of *Messrs. Crawford & Eakin*, with an oral argument by *Mr. Robert Eakin*.

Opinion by MR. CHIEF JUSTICE MOORE.

The plaintiff's counsel move to dismiss the appeal on the ground that the appellant had assigned all its interest in the property affected by the decree before attempting to review that final determination. It appears from the uncontradicted affidavits, filed supplemental to the motion, that the Boise Cold Storage Company secured against the Hot Lake Sanatorium Company a judgment for \$1,938.29, exclusive of costs and disbursements, that was assigned to the Phoenix Land Company, a corporation, which thereafter took and perfected an appeal in the name of its assignor.

1. Our statute, which is the foundation of the right asserted by the appellant's counsel, reads:

"Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in Section 29, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract": Section 27, L. O. L.

"No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage, or other disability of a party, the court may, at any time within one year thereafter, on motion, allow the action to be

continued by or against his personal representatives or successors in interest": Section 38, L. O. L.

"Any party to a judgment or decree other than a judgment or decree given by confession, or for want of an answer, may appeal therefrom": Section 549, L. O. L.

Construing these clauses *in pari materia*, our court is committed to the doctrine that after an action or suit has been commenced no substitution is required, except in case of the death of a party: *Long v. Thompson*, 34 Or. 359 (55 Pac. 978); *Merriam v. Victory Min. Co.*, 37 Or. 321 (56 Pac. 75, 58 Pac. 37, 60 Pac. 997); *Culver v. Randle*, 45 Or. 491 (78 Pac. 394); *Burns v. Kennedy*, 49 Or. 588 (90 Pac. 1102); *Fildew v. Milner*, 57 Or. 16 (109 Pac. 1092); *Oregon Auto-Dispatch v. Cadwell*, 67 Or. 301 (135 Pac. 880); *Dundee M. & T. Inv. Co. v. Hughes* (C. C.), 89 Fed. 182. We conclude, therefore, that as the Boise Cold Storage Company was made a party to this suit and assigned all its interest in the property affected by the decree herein after it was rendered, the assignee, under the provisions of our statute, was authorized to take and perfect an appeal from such determination in the name of the assignor, and having done so, the motion to dismiss the appeal is denied. The conclusion thus reached is deemed essential to a determination of jurisdiction of the appeal, in order to consider the merits of the cause which relate to the action of the trial court in overruling the demurrer. In order properly to understand the question involved, it becomes necessary to call attention to clauses of the trust deed. Article I thereof, as far as deemed material, reads:

"Until the said Hot Lake Sanatorium Company shall make default in the payment of the principal or interest of the said bonds or some of them, according to the tenor thereof, or of the coupons thereto annexed,

or some one or any of them, at the time or in the manner named for the payment thereof, and such default shall continue for the period of six (6) months, or shall make default or breach in the performance or observance of any condition, obligations or requirements contained in said bonds or this deed of trust or mortgage, the said Hot Lake Sanatorium Company may possess, manage, operate and enjoy all the said property and premises hereby mortgaged and receive, take and use the income, tolls, rents, issues and profits thereof to the same effect as if this deed of trust or mortgage had not been made."

Article 3 declares:

"If, and whenever the said Hot Lake Sanatorium Company, or its successors shall make any default in the payment of the principal or interest of said bonds, or some one or any of them, or of the coupons thereto annexed, or some one or any of them, according to the tenor or effect thereof at the time and in the manner of the payment thereof and such default shall continue for the period of six (6) months * * it shall be lawful for the trustee * * by its attorney or agent to sell and dispose of all and singular said property belonging to the Hot Lake Sanatorium Company and all said real property hereby mortgaged as a whole, by public auction," etc., prescribing the place of sale and the notice requested.

Article 4 provides:

"If the Hot Lake Sanatorium Company, or its successors, shall make default in the payment of any interest or any of said bonds according to the tenor thereof, or make default in the payment of any of the sums of money herein promised to be paid, then and thereupon such trustee shall, if requested by the holder or holders of at least one half in amount of said bonds then outstanding, declare the principal of all of said bonds to be immediately due and payable and thereupon all said bonds shall be due and payable, provided nevertheless that at any time after such default shall have been made, and have continued as aforesaid, and

before the actual payment of the principal, it shall be lawful for the holders of a majority in amount of said bonds then outstanding, to direct the trustee, either forthwith to exercise its power of declaring the principal of said bonds due and payable, or waive the exercise of said power, if unexercised, or to withdraw or annul the exercise thereof, if exercised either absolutely or with the consent of the Hot Lake Sanatorium Company, or its successors, and to direct the trustee to dismiss any suit brought against the Hot Lake Sanatorium Company, or to abandon any proceeding for the sale of the property herein described, provided, nevertheless, that no action taken by the trustee, or by the bondholders, under this article shall prejudice or affect the powers or rights of the trustee or of said bondholders, in the event of any subsequent default."

Article 5 asserts:

"It shall be lawful for the trustee to exercise the said power of entry or the said power of sale, or both, or to proceed by suit or suits in equity or at law to enforce the rights of the bondholders in the several cases of default on the part of the Hot Lake Sanatorium Company, or its successors herein specified, in the manner and subject to the qualifications herein expressed upon the request as herein prescribed."

The complaint, *inter alia*, charges:

"That all of said \$250,000 in bonds are outstanding and unpaid, and no part of the interest maturing upon said bonds or any thereof on September 1, 1915, has been paid, and that said Hot Lake Sanatorium Company has made default in such payment, and that after such default was made and prior to the commencement of this suit [a majority of] the holders of more than one half of the amount of said bonds so outstanding requested plaintiff, F. L. Meyers, as such trustee, to declare the principal of all of said bonds immediately due and payable, and to commence suit for the foreclosure of said trust deed and mortgage and the collection of the sums, both principal and interest, due upon all of said bonds, and that accordingly plaintiff, as such

trustee, did and does here now declare the principal of all of said bonds immediately due and payable."

2. The holders of a majority of the outstanding bonds, as provided in Article IV of the trust deed, must have owned or controlled more than \$125,000 of such evidence of indebtedness. "A majority of the holders of more than one half of the amount of said bonds so outstanding," as alleged in the complaint, would be required to have a title or legal right to only a fraction more than \$62,500 of such securities. The averment of the complaint hereinbefore quoted is technically defective in stating a cause of suit in this particular. The fault referred to is not mentioned in the brief of appellant's counsel, and, this being so, it must be assumed that the attention of the trial court was never attracted to this imperfection.

3. At the argument in this court, however, much stress was laid upon the words, "a majority of," as used in the complaint and hereinbefore indicated by brackets, and it is contended the facts so stated are insufficient to constitute a cause of suit, and, this being so, the decree should be reversed in consequence of the error committed in overruling the demurrer. If the primary pleading had omitted a material averment, the rule now insisted upon would undoubtedly be controlling, for in such case no foundation would exist upon which to support a judgment rendered in conformity to the prayer of the complaint. So, too, in case of a mere technical defect in a pleading, if it appear that the attention of the court was called by the interposition of a demurrer which distinctly specified the grounds of objection to the complaint, thus affording an opportunity for an amendment, and the demurrer was overruled, a different question would be presented in reviewing the judgment or decree.

The assertion of "the law's delay," of which complaint is often made, would be verified by sanctioning such a mode of practice as was evidently pursued at the trial of this cause.

The phrase, "a majority of," as used in the complaint, is unquestionably a mistake, and the technicality may have occurred by oversight of plaintiff's counsel in dictating, or by a stenographer in transcribing the notes. But, however the error may have resulted, it can be corrected by eliminating the words in the brackets referred to, and, having done so, the complaint will then state facts sufficient to authorize an enforcement of the conditions of the trust deed, if such relief was contemplated under the circumstances mentioned. By striking out such phrase, it is not to be supposed that the remaining allegation of the part of the complaint hereinbefore quoted could have been truthfully denied, for if the plaintiff had not been requested, by the holders of more than one half of the then outstanding bonds, to declare a maturity of such evidences of corporate indebtedness and to foreclose the trust deed, a plea in abatement would undoubtedly have been interposed. The technical defect which was adverted to at the argument in this court will be disregarded.

4. The remaining question to be considered is whether, under the terms of the trust deed, a suit can be maintained to foreclose the lien at the request of the holders of more than one half of the outstanding bonds, before the expiration of six months from the default in paying the coupons. A careful reading of the articles of the trust deed, hereinbefore set forth, will show that two remedies are prescribed. After a default of six months in the payment of the interest coupons, the trustee may, on his own motion, proceed

by strict foreclosure or for an ordinary foreclosure by a suit instituted for that purpose, to bar the right of the Hot Lake Sanatorium Company in and to the real and personal property mortgaged. It is unnecessary now to consider whether or not a strict foreclosure can be had, since such a remedy has not been invoked. Article IV reserves to the holders of a majority of the bonds power to set aside any proceedings instituted by the trustee on his own motion, and also to cancel their own previous request, to declare a maturity of the corporate indebtedness, and to commence a suit to foreclose the lien. It is believed a fair construction *in pari materia* of all the conditions of the trust deed authorized the trustee to maintain a suit to foreclose the lien, immediately upon default of any of the provisions specified, if so requested by the holders of a majority of the then outstanding bonds.

This being so, no error was committed in overruling the demurrer and in granting the relief awarded. The decree is therefore affirmed.

AFFIRMED. REHEARING DENIED.

Argued September 12, affirmed October 17, 1916, rehearing denied January 23, 1917.

WAKEFIELD v. SUPPLE.*

(160 Pac. 376.)

Appeal and Error—Review—New Trial.

1. The trial court having the power, within the time allowed, to set aside a final determination and order a new trial when it discovers a mistake of law has been made which would necessitate a reversal on review, the question to be considered on appeal from an order allowing a motion to set aside a verdict and judgment, and for

*Upon the question of effect of parol modification of original contract which is required to be in writing, see note in 4 L. R. A. (N. S.) 980.
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a new trial, because of error committed by overruling a motion for nonsuit and a motion for a directed verdict for defendant because an alleged oral modification of an original written contract was not established, is whether the evidence received in respect to the alleged oral modification was sufficient to authorize a submission of the cause to the jury.

Contracts—Modification—Written Contracts—Subsequent Parol Agreement.

2. The terms of a written contract may be altered by a subsequent parol agreement of the parties.

Contracts—Evidence—Sufficiency.

3. In an action to recover compensation for additional work done, not contemplated in an original written agreement, but alleged to have been authorized by a subsequent parol modification of the written contract, evidence of conversations and correspondence between the parties *held* insufficient to go to the jury as tending to establish that the alleged subsequent oral agreement modifying the written contract was made.

[As to validity and construction of provision in building contract permitting alterations or modifications, see note in *Ann. Cas.* 1915D, 758.]

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This is an action by Robert Wakefield against Joseph Supple to recover money. The basis of the action is a contract, set out in the complaint, and reads:

“Joseph Supple having entered into a subcontract with the Portland Iron Works for the furnishing of all labor and material and for the building of steel hulls, trusses, ladders, etc., as well as all carpenter and wood work, for the two United States engineers’ dredges ‘Multnomah’ and ‘Wahkiakum,’ hereby enters into an agreement with Robert Wakefield, whereby on consideration hereinafter mentioned:

“Joseph Supple agrees to prepare the ways, false-work and scaffolding, at the yards of the O.-W. R. R. & N., known as the ‘Boneyard,’ for the building and erection of the two dredges above named, and deliver f. o. b. cars, all of the steel work for hull, fabricated and ready for erection, but not riveted, nor bolted up,

and all of the steel work for trusses and ladder, fabricated and riveted, but not assembled.

"Robert Wakefield agrees that he will receive this material from cars, and will furnish his own means and apparatus for unloading the material, storing same until wanted, and erect and assemble same in place, in accordance with the plans and specifications, approved for this work, by the United States engineers.

"That he will do all of the bolting up, riveting, calking and testing, to the satisfaction of the inspector, and in accordance with these plans and specifications.

"Joseph Supple will furnish all labor and material necessary for blocking, staging and launching. It being herewith reiterated, that all tools and all gears for handling and rigging of all steel work of whatever nature, will be furnished by Robert Wakefield, and that all wood work and material and labor for foundations will be furnished by Joseph Supple, except that used for hoisting and hoisting gears.

"In consideration of the above agreement, Joseph Supple agrees to pay Robert Wakefield, fifteen dollars (\$15.00) for every ton of hull material erected and put together, and seven and one-half dollars (\$7.50) per ton for the assembling of the trusses and ladders.

"It is mutually agreed on, that the actual weight on cars shall be ascertained from the R. R. Co., and that these weights shall be taken as basis on which Robert Wakefield shall make his charges.

"Joseph Supple agrees to make payments to Robert Wakefield, at the time and at the rate, as he receives his payments for work completed from the Portland Iron Works.

"It is particularly understood between the two contracting parties, that the same conditions of the terms of the specifications above referred to, as well as the conditions of the contract entered upon between Joseph Supple, and the Portland Iron Works, as far as they prevail, and that any dispute as to the interpretation of these specifications and contract, shall be subject to the decision of the inspector representing the contracting engineer of the U. S. government.

"Inasmuch as Joseph Supple has entered into a sub-contract with the Great Lakes Engineering Company, of Detroit, Michigan, to fabricate for him the steel hull material above mentioned, and inasmuch as this last-named company is responsible for the proper fabrication of the material, in accordance with the specifications and plans, and have agreed to have one of their men present while the work of erection and assembling is under way, it is hereby agreed that Robert Wakefield hereby accepts the guarantee furnished Joseph Supple by the said Great Lakes Engineering Works, and agrees to take up and settle with said representative, any discrepancies which may be discovered on the work and material, and make his own agreements for extra charges for the correction of any possible changes or mistakes discovered, due to faulty fabrication on the part of the Great Lakes Engineering Works.

"In witness of the above the parties herein mentioned have hereto set their hands and seals.

"Portland, Ore., Feb. 11, 1913.

"[Signed] JOSEPH SUPPLE.

"[Signed] ROBERT WAKEFIELD."

The initiatory pleading charges, in effect: That when the plaintiff entered into that agreement he had been and was a bridge builder, and was unacquainted with the construction of any part of a ship or the cost of doing such work. That the defendant for a long time had been engaged in shipbuilding and knew the plaintiff was not familiar therewith, and that he relied upon the representations made by the defendant and his agents in relation thereto. That, when informed of the plaintiff's want of knowledge in these particulars, the defendant advised him to consult with Fred Ballin, a shipbuilding engineer who had prepared the plans for the dredges and was to have charge of the construction thereof and upon whose word he could rely. That plaintiff thereupon conferred with

Ballin, who informed him that the steel plates to be used in building the dredges would arrive in Portland, Oregon, with all the smaller parts riveted to the larger portions in such manner as to be conveniently shipped by rail, and plaintiff would be required only to bolt and rivet the larger sections together on the job; that the material to be used would be free from rust, each piece plainly marked, all plates to be calked would be beveled-sheared; that all punched holes would be reamed so as to countersink the rivet heads; that all necessary bolts would be supplied by the defendant; that plaintiff would be required to drive only about 150 rivets to the ton of material; and that all the plates would be painted before delivery. That the plaintiff believed and relied upon each of these representations. That at the time they were made Ballin was interested with the defendant in whatever profits the latter might make under his contract for constructing the dredges, of which partnership the plaintiff had no knowledge. That immediately upon signing the contract the plaintiff engaged mechanics and laborers, assembled his machinery, and notified the defendant of his readiness to commence work on the dredges, but no material therefor was delivered until June 15, 1913, when that which arrived was not connected in any manner. That no bolts were furnished. That it was necessary for the plaintiff to drive 240 rivets to the ton of material. That the members thereof were not marked for identification. That the punched holes did not fit one with another and were not reamed, and that the material was rusty and unpainted. That at the time Ballin made such representations he knew they were false and uttered them with intent to defraud the plaintiff and to induce him to enter into the contract hereinbefore set forth. That when the delivery of the ma-

terial was thus delayed, and the plaintiff discovered the extra amount of work required, and learned of Ballin's financial interest in the profits which he was to obtain, the plaintiff informed the defendant of the falsity of his agent's representations, called attention to the faulty condition of the material, and to the amount of work necessary to assemble and prepare the parts, and informed him of the resulting delay and damage which the plaintiff would sustain by reason thereof.

"That thereupon the defendant orally requested plaintiff to enter upon and complete the work of erecting said materials in place, and thereupon agreed orally with plaintiff that he [defendant] would pay plaintiff whatever the work and labor was found to be reasonably worth at the conclusion of said work, taking into account all the facts and circumstances in connection with the work, including the delay, and agreed to pay plaintiff the reasonable worth and value of any materials furnished by plaintiff. That, in reliance upon said oral promise, this plaintiff did completely erect and assemble all materials in place for said two hulls upon the dredges 'Multnomah' and 'Wahkiakum' and furnished various materials therefor. That the reasonable worth and value of the work, labors and materials so furnished by plaintiff to defendant upon said two hulls is the sum of \$29,408.98, of which defendant has paid only \$8,785, leaving a balance due plaintiff in the sum of \$20,623.98, which balance and any part thereof defendant refuses to pay, and said defendant refuses to recognize that this plaintiff has any rights in the premises other than the rights fixed in the written contract hereinbefore referred to, and said defendant refuses to consider with plaintiff, plaintiff's rights in the premises, and defendant renounces and denies plaintiff's rights in the premises."

Judgment was demanded for the sum of \$20,623.98.

The answer denied most of the material averments of the complaint, and particularly with respect to the

alleged misrepresentations mentioned. For a separate defense, the answer sets forth the circumstances attending the making of the contract and alleges that the plaintiff received from the Great Lakes Engineering Works, which corporation furnished the material that was used in constructing the dredges, various sums of money as compensation and settlement for changes necessitated in the material furnished, and for the mistakes in the fabrication thereof, and thereupon he agreed to withdraw his claim for extra compensation on account of reaming and countersinking, and by reason thereof he is now estopped to assert or claim that any sum is due him therefor. Other matters are set forth in the answer as further defenses.

The reply put in issue the allegations of new matter in the answer, and based on these issues the cause was tried, resulting in a verdict and judgment for the plaintiff in the sum of \$4,500. Upon application therefor, it was determined in part as follows:

“The court, after hearing arguments of the respective counsel, being fully advised, and being of the opinion that error was committed during the trial by overruling the motion for nonsuit and overruling the motion for a directed verdict for defendant and that a new trial should be granted, it is therefore ordered that the motion to set aside the verdict and judgment, and for a new trial, be and the same is hereby allowed.”

From this order the plaintiff appeals.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Coy Burnett* and *Mr. McKinley Kane*, with an oral argument by *Mr. Burnett*.

For respondent there was a brief with oral arguments by *Mr. Arthur Langguth* and *Mr. Henry L. Lyons*.

Opinion by MR. CHIEF JUSTICE MOORE.

1, 2. In *Smith Typewriter Co. v. McGeorge*, 72 Or. 523 (143 Pac. 905), it was held that when the trial court, within the time allowed, discovers that such a mistake of law has been made at the hearing of a cause as would necessitate a reversal of the judgment if brought up for review, such final determination may be set aside and a new trial ordered. To the same effect, see, also, *Rudolph v. Portland Ry., L. & P. Co.*, 72 Or. 560 (144 Pac. 93); *Frederick & Nelson v. Bard*, 74 Or. 457 (145 Pac. 669); *McGinnis v. Studebaker*, 75 Or. 519 (146 Pac. 825, 147 Pac. 525, L. R. A. 1916B, 868); *Delovage v. Old Oregon Creamery Co.*, 76 Or. 430 (147 Pac. 392, 149 Pac. 317); *Pullen v. Eugene*, 77 Or. 320 (146 Pac. 822, 147 Pac. 768, 1191, 151 Pac. 474). Predicated upon this rule, the question to be considered is whether or not the evidence received in respect to the alleged oral modification of the original contract was sufficient to authorize a submission of the cause to the jury. The rule is settled that the terms of a written contract may be altered by a subsequent parol agreement of the parties: *Pippy v. Winslow*, 62 Or. 219 (125 Pac. 298); *City Messenger Co. v. Postal Tel. Co.*, 74 Or. 433 (145 Pac. 657). The plaintiff's testimony tends to support the averments of the complaint in respect to the delay occasioned by failing to deliver the material within the time expected, and also as to the extra amount of labor necessitated by reaming the punched holes in the plates. In a letter which he wrote to the defendant May 28, 1913, in referring to these matters, he says:

"Of course, this long wait has caused me considerable expense, as I have had to keep men within call and keep a plant down there ready at all times to unload the material. I think I am entitled to some compensation for all this delay and should be pleased to hear from you in the matter, as I do not wish to be unreasonable or make any unreasonable demands. Further, when I took the work it was expected that the erection bolts would be furnished with the material. I have had to furnish these bolts and think it would be no more than right that you should pay for them, as I took the work at a very low figure. As there is considerable of the material on hand now, we have started to get it together and think we should have some understanding about the lost time that has passed before going any further."

Plaintiff on June 11, 1913, again wrote the defendant as follows:

"I am assembling and riveting hulls for the two government dredges, the work having been undertaken, as per my contract of February 11, 1913. Not having specifications or plans showing details and descriptions of the work, I derived my information for the work required from Fred A. Ballin. At the time our contract was signed it was expected that the steel would arrive in a few days. The last four cars of this steel arrived yesterday, being about two months later than expected and the other cars having been strung along one at a time made it necessary to keep a force of men on hand in readiness to unload this material and adding additional expense to the cost of the work. It was expected that erection bolts would be furnished with this material and as I furnished these bolts I should be paid for the same. The plates that have to be calked were to have been beveled-sheared, which was not done. All connections were to have been riveted to the large members. Failure to do this has increased the number of rivets to be driven and the steel being in small pieces adds to the difficulty and cost of handling same. The wedges to be used

as stop waters at the butt of the lower sheets should have been punched at the shop, and this will have to be done before they are driven, as it would be too expensive to drill them after they are in place. As these changes will make the work cost more than the prices given in my contract, I suggest that you and Mr. Ballin meet me at the yard at your earliest convenience and reach some agreement to take care of this additional cost. I do not wish you to be dissatisfied nor do I wish to be out any money on account of this work."

From a letter written by Wakefield to Supple July 12, 1913, an excerpt is taken as follows:

"I have written to you repeatedly stating the difference between the job we are doing and the job we contracted to do. The contract expressly stated that the material is to be fabricated, which I understand, means ready to put together, while the actual work we are doing is reaming the thing entirely all over, or, in other words, there has been no work done except merely punching and a very poor job at that. The material is badly marked so that it is very difficult to find the pieces that belong together and lots of the material that should be put together under the clause 'Fabrication' is shipped loose, little pieces of angle 2x2, 4 to 6 ft. in length. I have written you a great many times about these differences, but do not seem to get any direct results from them other than, 'will make it all right in the end' but there is so much to be made right that I think we ought to have an understanding now. I am perfectly willing to do as we agreed in our contract to leave our differences to the inspector for the government, Mr. Baxter. The clause in the contract referring to your having an agreement with the Great Lakes Engineering Company for the fabrication in which they are responsible for the proper execution of the same, their representative disclaims any responsibility for mistakes and says that the reaming is especially excluded from their contract."

Replying to this communication, the defendant on July 14, 1913, wrote the plaintiff a letter, from which extracts are taken, viz.:

"Dear Sir: Your favor of the 12th inst. duly noted. You state that you have written a number of letters regarding our contract for the building of the two government dredges, and that I have failed to answer them in writing. Permit me to state that as far as differences are concerned, there is no need to take up any generalities, inasmuch as the contract itself, states very definitely and positively what part of the work is to be done by yourself and me. * * You further agreed to settle with the representative of the Great Lakes Engineering Works, any discrepancies which may be discovered on the work and material, and make your own agreements for extra charges, and for their collection for the correction of any possible changes or mistakes discovered, due to faulty fabrication on the part of the Great Lakes Engineering Works. * * You further state, that I made you understand that I would 'Make it all right in the end,' implying that I acknowledged that there was something to make all right. I wish to dispel this impression emphatically, as so far nothing has appeared on which you could base any claims against me under our contract. I did say and meant to say, that where you could show that I owed you any money in the end, I would pay you, provided you could make the right kind of a showing. * * I understand from Capt. Haight, representing the G. L. E. W., that he is willing to correct any mistakes made in fabrication."

The quotations from these letters partly express the dispute existing between the parties. It appears from the testimony that the plaintiff sustained a financial loss by reason of the delay in delivering the material; that he was hindered in the performance of his work in assembling the parts because the numbers placed thereon were worn off by transportation; and that he was hindered in attempting to find, or in pro-

curing, substituted parts. The evidence shows that Mr. Wakefield settled with C. M. Haight, the representative of the Great Lakes Engineering Works, from whom he received a credit for extra work. What sum was thus accounted for is uncertain. Mr. Haight stated upon oath that \$135 was so credited, while S. R. Booth, who as bookkeeper had charge of the plaintiff's office, testified the plaintiff "received something like \$300 for these extras that cost him about \$20,000."

It will be taken for granted that the plaintiff's testimony was sufficient to be submitted to the jury as tending to substantiate the averments of the complaint with respect to the existence of a partnership between the defendant and F. A. Ballin, whereby the latter was to have received a consideration for personally supervising the work of constructing the dredges. It will also be assumed that Wakefield's testimony was adequate to go to the jury as tending to establish the allegations of the primary pleading as to Ballin's asserted representations, though such imputed declarations are denied by him. His financial interest in the contract and his alleged falsification of material facts to the plaintiff might show an inducement to modify the written contract. While such incentive could afford a valid reason for altering the original agreement, it is insufficient by itself to sanction a change in any of the terms of the writing.

In *Barber v. Toomey*, 67 Or. 452, 463 (136 Pac. 343, 346), Mr. Justice RAMSEY says:

"In order to establish a contract, the evidence should show when, where, and with whom the contract was made, and the terms thereof."

A transcript of the testimony given at the trial of this cause, consisting of 812 pages, has been carefully read and considered; but from such research we have

been unable to find any witness who testified to a modification of the original agreement.

The complaint charges:

“That upon the discovery by plaintiff of the delay in delivery of said materials and members and its condition, and the amount of work required to erect and assemble said materials in place and upon discovery by plaintiff that said Ballin was financially interested with said defendant in the profits to be made from said contract, this plaintiff informed defendant” thereof; and “that thereupon the defendant orally requested plaintiff to enter upon and complete the work of erecting said materials in place, and thereupon agreed orally with plaintiff that he [defendant] would pay plaintiff whatever the work and labor was found to be reasonably worth at the conclusion of said work.”

The testimony shows that it required about three weeks to transport a carload of the material used in the construction of the dredges from Detroit, Michigan, where it was “fabricated,” to Portland, Oregon, William Wakefield, the plaintiff’s son, testified that the first carload was sent out from the factory March 18, 1913, and the last carload on May 21st of that year. The first carload should have arrived about April 10, 1913, when the plaintiff evidently discovered that the smaller parts of the material had not been bolted or riveted to the larger members, and that the marks that had been placed on the plates had been worn off in transit. An examination of the letter from Wakefield to Supple, July 12, 1913, wherein it is stated, “I have written you a great many times about these differences, but do not seem to get any direct results from them other than, ‘will make it all right in the end,’ but there is so much to be made right that I think we ought to have an understanding now,” will show that on that date no definite oral agreement had been made.

On his direct examination the plaintiff's attention was called to the language thus employed, and he was asked by his counsel:

"Now, I wish you would tell the jury what conversations you had with Mr. Supple wherein he told you he would make it all right in the end, if any."

The witness replied:

"Well, we had numerous conversations relating to differences in the way the material was being delivered, and what I had anticipated and what the contract to my ideas called for; but Mr. Supple would not come right down to anything. He would always be sort of evasive and say he would look it up, and make it all right, and see that I didn't lose anything, and that kind of talk.

"Q. Now, along in June, down on the works, did you have a conversation with Mr. Supple?

"A. I had several. I had one I remember in particular, in the early part of June; but it was all to the same purport, complaints of methods of delivery and condition of the stuff as delivered and the poor work that was done.

"Q. What did he say, if anything?

"A. He promised that he would make it all right; to stop kicking and he would see that it was all right.

"Q. See that what was all right?

"A. Why, I suppose the remuneration; that is what we were talking about.

"Q. Remuneration to whom?

"A. To me, I suppose; there was nobody else interested.

"Q. And for what?

"A. For the building of the dredges.

"Q. Did you then go ahead and build them?

"A. Yes, I went ahead and built them under protest right from the start, objecting at all times from the start about the time, and explained to him that the prolongation of the delivery was working a serious hardship on me; that wages were going up all the time; and that the men I had who would stay by me

and knew me were all drifting away one at a time, and then had to be replaced by somebody else."

The testimony shows, however, that the only exact promise made by the defendant was to the effect that if he made any money by building the dredges, and the plaintiff lost any, in performing his part of the agreement, Supple would aid Wakefield. Thus Mr. Supple, as a witness, was directed by his counsel:

"Tell the jury what conversation you had with Mr. Wakefield over extras or over this contract in which he said something about suing you, and when was that?"

The defendant replied:

"Well, that was along, as near as I can remember, about four weeks or so before I paid him the last payment. He said he guessed he would have to sue me. He says, 'Well, Joe, you are going to make a whole lot of money off of this.' We were both standing out there, and I think Mr. Clark was standing there, and he [the plaintiff] says, 'I am losing money on it, and I think I will have to sue you.' He had told me that before. I said 'Well, Mr. Wakefield, if you will push this thing along, and I make any money off this job, and you don't, I will help you out.' Now, that is what I said to him. * *

"Q. What did he say then?

"A. He said, 'All right, we will let it go at that.' "

This testimony is corroborated by that of C. M. Haight, who quoted Mr. Wakefield when the latter on September 24, 1913, referring to the adjustment of what he considered unusual amounts with respect to constructing the hulls of the dredges, said:

"But, Joe, you don't think for a moment that I ought to pay for all these extra bills?

"Q. Whom did he mean by 'Joe'?

"A. Mr. Supple. Mr. Supple sat right across the table from Mr. Wakefield, and Mr. Supple says, 'Well, you go ahead and rush this work through, and I don't know but what I am going to be at a loss the way the work is dragging on; and when the work is finished, if I have made any money and you show you have lost money, I will make it right with you.' "

Assuming, without deciding, that such a promise is enforceable, the testimony as to the avails received by the defendant under the terms of his contract with the Portland Iron Works to build and finish the dredges, except to furnish and install the machinery, shows that he lost money in complying with the terms of his agreement. The defendant, speaking of this matter and of Mr. Wakefield, testified as follows:

"Now, I didn't suppose I had to help him out, or I didn't owe him anything; but I would divide up with him; I would help him out if I made anything and he didn't. * *

"Q. Did you make anything, or did you lose?

"A. I am out over \$13,000 in hard-earned money. I didn't get it out of any extras there either; and all through their fault with dilly-dallying along with the work.

"Q. What was the reason?

"A. Because they [the plaintiff and his employees] did not push the work ahead. They misrepresented the thing to me; said they had tools and men and everything and they would push this thing right along, and they only had a few tools and nothing like men enough to build a boat one quarter the size of either one of those in any kind of time. If they had done the work, I would have come out all right.

"Q. What does this \$13,000 consist of, this loss? Is it what the government holds back?

"A. It is money I paid out, and the most of it is money that the government took from me at a hundred dollars a day, because I could not get them to do anything. I could not get the work along."

A. F. Tarilton, the defendant's bookkeeper, was asked:

"Do you know whether or not Mr. Supple made or lost money on this contract—yes or no?

"A. He lost money.

"Q. State if you know what his loss was. * *

"A. It is \$15,366.98."

The defendant testified that Mr. Ballin was to have received compensation for supervising the construction of the hulls of the dredges if any money had been made under the contract with the Portland Iron Works, and this witness further stated upon oath that he so informed the plaintiff before the latter subscribed his name to the agreement.

Mr. Ballin also testified that he made no misrepresentation to the plaintiff, but informed him generally of the nature and extent of the work required to be performed, and delivered to Mr. Wakefield a set of the completed plans before the contract was consummated.

3. An examination of the testimony convinces us that the written contract was never modified by any subsequent oral agreement; that the evidence received on this branch of the case was insufficient to be submitted to the jury as tending to establish the averment of the complaint in this particular; and that no error was committed in setting aside the verdict and judgment.

It follows that the order of the court complained of is affirmed. AFFIRMED. REHEARING DENIED.

MR. JUSTICE BEAN, MR. JUSTICE BENSON and MR. JUSTICE McBRIDE concur.

Argued January 5, reversed January 23, 1917.

BELMONT v. BELMONT.*

(162 Pac. 830.)

Divorce—Grounds—"Cruelty."

1. In a wife's action for divorce, where the evidence shows that defendant treated plaintiff in a cruel and inhuman manner, with personal indignities, cursing her, striking her, bruising her arm and neglecting her when she was in ill health, thereby rendering her life burdensome, plaintiff was entitled to a divorce on the ground of cruelty.

[As to cruelty as ground for divorce, see notes in 29 Am. Dec. 674; 73 Am. Dec. 619; 40 Am. Rep. 463; 51 Am. Rep. 736; 65 Am. St. Rep. 69.]

Divorce—Allowance—Money Invested.

2. Where a wife was granted a decree of divorce, she was entitled to judgment against the defendant for a sum invested by her in real estate, which shall be a lien on the defendant's interest therein.

From Multnomah: **WILLIAM N. GATENS**, Judge.

Department 2. Statement by **MR. JUSTICE BEAN**.

This is a suit for divorce by Alice J. Belmont against John A. Belmont, in which the defendant filed a cross-complaint asking the same relief. From a decree denying both prayers, plaintiff appeals. Reversed and decree rendered for plaintiff as prayed for.

REVERSED. DECREE RENDERED.

For appellant there was a brief over the name of *Messrs. Westbrook & Westbrook*, with an oral argument by *Mr. Henry S. Westbrook*.

For respondent there was a brief and an oral argument by *Mr. Plowden Stott*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. We find that the evidence substantially sustains the allegations of plaintiff's complaint and shows that

*On profanity and obscenity as grounds for divorce, as cruelty, see note in 12 L. R. A. (N. S.) 820. **REPORTER.**

defendant treated her in a cruel and inhuman manner, with personal indignities, cursing her, striking her and bruising her arm, and neglecting her when she was in ill health, thereby rendering her life burdensome. Defendant failed to substantiate his affirmative answer. Details of the unfortunate affair would be of no value to anyone.

2. The plaintiff is entitled to judgment against defendant for \$830, the sum invested by her in the real estate described in the complaint, which is declared to be a lien upon defendant's interest therein, and an undivided one-third part in fee of the remainder of his share in such real property. Defendant will be required to pay plaintiff \$20 on the first day of each and every month toward her maintenance until the further order of the court. Plaintiff is decreed to be the owner in her own right of all the household goods, furnishings and equipment in the cottage at No. 271 Fourteenth Street North, Portland, possessed by her at the commencement of this suit.

The decree of the lower court will be reversed, and one entered in accordance herewith as prayed for by plaintiff.

REVERSED. DECREE RENDERED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE HARRIS and MR. JUSTICE BENSON CONCUR.

Argued January 16, affirmed January 23, 1917.

FRAZIER v. COTTRELL.

(162 Pac. 834.)

**Partnership—Bills and Notes—Liability—Signature by Trade Name—
"Person."**

1. Under Section 5851, L. O. L., making one who signs a note in a trade or assumed name liable as if he signed his own name, and Section 6023, defining "person" to include a body of persons, whether incorporated or not, and in view of the fact that a partnership may adopt any name it chooses as its firm name, and that each partner is the agent of the firm and may sign its name to any paper given for partnership business, a note signed, "The Oregon Locators, by F. L. G., member of the firm authorized to sign the firm name," renders the firm and the other member liable.

[As to liability or partnership on note executed in name of a single partner, see note in *Ann. Cas.* 1912A, 618.]

Appeal and Error—Scope of Review—Absence of Bill of Exceptions.

2. In the absence of a bill of exceptions, the appellate court can consider only whether the findings support the judgment.

From Multnomah: ROBERT G. MORROW, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action by W. F. Frazier against L. R. Cottrell and F. L. Granger, *alias* Guy H. Clark, partners as The Oregon Locators, on a promissory note for the sum of \$100 given to George L. Masten and by him indorsed to the plaintiff. Action was commenced in the Justice's Court, where a trial was had and a judgment rendered for plaintiff. On appeal to the Circuit Court, a trial without the intervention of a jury resulted in a determination in favor of plaintiff. From this defendant Cottrell appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. William C. Benbow.*

For respondent there was a brief and an oral argument by *Mr. George L. Masten.*

MR. JUSTICE BEAN delivered the opinion of the court.

The note is signed, "The Oregon Locators, by F. L. Granger, member of the firm authorized to sign the firm name." It is alleged in the complaint and was found by the trial court that at the time of the execution of the note L. R. Cottrell and F. L. Granger, *alias* Guy H. Clark, were partners doing business under the firm name and style of "The Oregon Locators," and that the note in question was given in consideration of services rendered the partnership.

1. But one contention is made upon this appeal, namely, that the note does not show any liability against the defendant Cottrell under Section 5851, L. O. L., which reads:

"No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided; but one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name."

It seems to us that the note comes within the last provision of this section that "one who signs in a trade or assumed name will be liable." It is also averred in the complaint and was found by the trial court that the defendants adopted as a firm name "The Oregon Locators." It is a well-recognized principle of law that a partnership may adopt any name it chooses as its firm name: 30 Cyc. 419. It is also well settled that each partner is the agent of the firm for the transaction of its business, and may sign the firm name to any paper given for the purposes of the partnership business: *Baker v. Seaward*, 68 Or. 80, 85 (136 Pac. 870); *Morgan's Estate*, 46 Or. 233, 237 (77 Pac. 608, 78 Pac. 1029). Section 5852, L. O. L., declares that "the signature of any party may be made by a duly authorized agent." The signature of the

firm name "The Oregon Locators" to the note is in law the signature of all the members of the firm thereto: 30 Cyc. 419, 420; 22 Am. & Eng. Enc. Law (2 ed.), 166. Section 6023, L. O. L., defining words used in the negotiable instruments law, states that "person" includes a body of persons, whether incorporated or not. These sections of Lord's Oregon Laws, being a part of our negotiable instruments law, are sufficiently definite to govern the question raised in this case. L. R. Cottrell being a member of the firm, his adopted name does appear on the note as found by the trial court.

2. The evidence produced upon the trial has not been brought to this court. In the absence of a bill of exceptions, the appellate court can consider only whether the findings support the judgment: *Jeffery v. Smith*, 63 Or. 514, 516 (128 Pac. 822); *Miller v. Head Camp*, 45 Or. 192 (77 Pac. 83).

Finding no error in the record, the judgment of the lower court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE
and MR. JUSTICE MCCAMANT concur.

Submitted on brief January 16, affirmed January 23, 1917.

ANDREWS v. SERCOMBE.

(162 Pac. 836.)

Religious Societies—Conveyances—Validity.

1. Land was conveyed to trustees of a religious society which abandoned the premises, and it was thereafter sold by order of the general conference by the "trustees of abandoned church property." Held, the conveyance was valid in absence of statute, it being in accordance with church discipline, and compliance with Sections 7177, 7178, L. O. L., relating to powers of trustees being permissive and not mandatory, did not apply.

Vendor and Purchaser—Construction of Contract—"More or Less."

2. Where a contract for the purchase of land described it by metes and bounds and ended "containing 32 acres more or less," the plain meaning of the words "more or less" is that the parties are to run the risk of gain or loss, and if there is only a trifle less than 32 acres, the shortage is not material.

[As to what the expression "more or less" indicates in the description of land conveyed, see notes in 41 Am. Dec. 410; 28 Am. St. Rep. 631.]

From Jackson: FRANK M. CALKINS, Judge.

In Banc. Statement by MR. CHIEF JUSTICE McBRIDE.

This is a suit by Aaron Andrews against Winifred Sercombe, Margaret B. McCord and the Big Pines Lumber Company, to foreclose a contract in the nature of a mortgage upon a tract of land in Jackson County. On October 1, 1910, defendants Sercombe and McCord contracted to purchase a tract of land from the plaintiff for the sum of \$7,500; plaintiff agreeing to convey the land in question to them by warranty deed. The contract specified that the title was clear of encumbrance, except a mortgage of \$100 against which the statute had run. The defendants have paid upon said contract the sum of \$2,500 and interest to the amount of \$700. The contract further provided for the payment by the obligees of all taxes and public charges, and a failure to pay these entitled the obligor to make payment of the same and charge the sum with interest thereon at the rate of 6 per cent per annum to the installment next maturing. Time is made the essence of a contract as to the payment of principal, interest and taxes; and failure of the obligees to make such payments entitled the obligor to declare the entire debt due and payable at once. The defendants defaulted in all the payments except those above mentioned, and allowed the taxes to become delinquent and a mechanic's lien to be placed upon the

property by the Big Pines Lumber Company, which is made a codefendant. The obligor's warranty deed, accompanied by a copy of the contract, was placed in one of the Medford banks for delivery to the obligees upon compliance with the terms of the contract, and a redelivery to the obligor in case of default. When the entire balance, principal, interest and taxes had become due and delinquent, plaintiff brought this suit.

The defendants set up as a defense the failure of title to 5 acres of the tract and a material shortage in the acreage. There was a decree for plaintiff, and defendants appeal.

Submitted on brief without argument, under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief submitted over the names of *Mr. William I. Vawter* and *Mr. T. W. Miles*.

For respondent there was a brief prepared by *Mr. W. E. Phipps* and *Mr. N. W. Borden*.

Opinion by MR. CHIEF JUSTICE McBRIDE.

1. There was no defect in the title to the 5-acre tract. The title, so far as it pertains to this case, is as follows: In 1872 Jeremiah True and wife conveyed the 5-acre tract to James Thornton, A. H. Boothby, S. L. Powell, J. W. Dollarhide and David Doty, as trustees of the Church of the United Brethren in Christ of Rogue River Mission, and to their successors in interest. It does not appear what was done with the property, but on July 4, 1908, it was reported to the annual conference as abandoned church property; and thereupon the "trustees of abandoned church property" were directed to sell the same, and in pursuance of such direction conveyed it to the plaintiff in this action

by deed executed July 8, 1908. It was contended that the trustees had no authority to make this conveyance by reason of the fact that they had not become incorporated, under the provisions of Sections 7177, 7178, L. O. L. We think this position is not well taken. Said sections are not mandatory, but permissive; and, in the absence of any statute to the contrary, the discipline and laws of the church will control as to the manner of acquiring and alienating property. Referring to the discipline of the church, we find the following:

"No board of trustees shall begin the building of a churchhouse or parsonage without first submitting their plans and estimates of lot, or lots, and building, to the official board or quarterly conference for consideration, approval, and directions. Nor shall they proceed to buy or build without first procuring an incorporation of their board, such as the state requires, nor without securing and recording a warranty deed, the blank form prepared by the Church-Erection Society, to themselves and their successors in office for the real estate which they purchase, nor until they have the necessary means either in hand or sufficiently assured, thus securing harmony of action and avoiding the incumbering of our houses of worship and parsonages with embarrassing debts."

As to the conveyance of property, among others, we find these provisions:

"When a house of worship outside of the jurisdiction of any quarterly conference ceases to be used by our own people for preaching or other religious purposes, it shall be the duty of the presiding elder of the district in which such house is located to report to the annual conference, which body shall have power to appoint a board of trustees, who shall rent, lease, or sell such house of worship, as they deem advisable, and report their proceedings to the annual conference, which body shall have power to use the proceeds to

pay debts on other houses of worship, build new houses, or turn the money into the funds of the Church-Erection Society, as may seem proper, at its own discretion; provided, that in no case shall a churchhouse and its premises be sold without the consent of the annual conference within whose bounds it is located. Should any parsonage be permanently abandoned as such, the presiding elder of the district in which such parsonage is located shall report the same to the annual conference, which body shall have power to appoint a board of trustees, who shall rent or sell such parsonage, and pay over the proceeds to the annual conference, which body shall expend the same in paying debts on other parsonages, or in building new ones within its borders. * * Real estate held for church or parsonage purposes shall be subject to the same regulations as houses of worship and parsonages."

The evidence indicates that the conveyance was made strictly in accord with the rules and discipline of the church, and the title to this 5 acres is perfect: *Nelson v. Monitor Cong. Church*, 74 Or. 162 (145 Pac. 37).

2. The testimony does not show clearly any material shortage in the land or any fraudulent misrepresentation as to the acreage, although it is possible that there is a trifle less than 32 acres. The land is described in the contract:

"Commencing at a point on the south line of D. L. C. No. 47, in township 38 south, range 2 west of the W. M., said point being five (5) chains west of the southeast corner of said D. L. C. and from said point running thence west 8.43 chains to the east line of lot five (5); thence south 8.24 chains; thence east 24.92 chains to the county road; thence along said county road as follows: North 31 degrees 29' west 4.325 chains; thence north 8 degrees 12' west 10.395 chains; thence north 61 degrees 27' west 2.01 chains; thence north 69 degrees west 6 chains; thence north 70 links to a point

on the north side of said road; thence west 5 chains; thence south 10 chains to the point of beginning, containing 32 acres, more or less."

Beyond this estimate in the contract there is nothing to indicate that plaintiff was guilty of any misrepresentation as to the acreage, and, indeed, no fraud or misrepresentation is claimed. It will be noted that in the contract the description of the land is by metes and bounds followed by the statement, "containing 32 acres more or less." "The plain and most obvious meaning of the expression 'more or less' is that the parties were to run the risk of gain or loss as there might happen to be an excess or deficiency in the estimated quantity": 5 Words and Phrases, 4583, citing *Harrison v. Talbot*, 32 Ky. (2 Dana) 258; *Jones v. Plater*, 2 Gill (Md.), 125 (41 Am. Dec. 408).

The decree of the Circuit Court is affirmed.

AFFIRMED.

Argued December 27, 1916, reversed January 23, 1917.

STATE v. McLENNAN.*

(162 Pac. 838.)

Larceny—Evidence—Admissibility.

1. In a prosecution for larceny of two horses from the range, testimony of a witness that he had seen an unbranded horse which the prosecutor claimed which answered generally to the description of one of the horses in question, and that later he had seen the same horse in the defendant's field with defendant's brand upon its left shoulder, was competent to show the acts of ownership exercised by the prosecutor over the animal mentioned from which the presumption might arise that it was his property.

*On evidence of other crimes in prosecution for larceny, see notes in 62 L. R. A. 231, 281, 315, 322, 43 L. R. A. (N. S.) 776.

For authorities discussing the question of possession of recently stolen goods as evidence of larceny, see note in 12 L. R. A. (N. S.) 199.

Larceny—Evidence—Admissibility.

2. The evidence was also admissible to show that the property was afterward found in the possession of the defendant, because it was in his pasture with his brand upon it.

Criminal Law—Evidence of Settlement—Admissibility.

3. In prosecution for larceny of two horses from a range, statement of a witness that the defendant in an interview with him had "evidenced a desire" to have the case settled out of court if possible was inadmissible, since it does not impute to the defendant any utterance whatever.

Criminal Law—Evidence of Settlement—Admissibility.

4. It was also inadmissible for the reason that there is nothing inculpatory in wishing to get a case "settled."

Criminal Law—Appeal and Error—Prejudicial Error.

5. In a prosecution for larceny of two horses from the range, error in the admission of testimony of witness that accused had evidenced a desire to get the case settled out of court if possible was cured by the court's action in withdrawing the testimony from the consideration of the jury.

Criminal Law—Evidence—Other Offenses—Admissibility.

6. In a prosecution for larceny of two horses from the range, evidence that the defendant had changed the brand on the animals and that he was concerned in killing them, although tending to prove distinct crimes separate from the one mentioned in the indictment, was admissible as tending to show a general plan or as an attempt to conceal his offense.

[As to brands on animals as evidence of ownership, see note in Ann. Cas. 1913E, 133.]

Criminal Law—Trial—Instructions.

7. In a prosecution for larceny of two horses from the range, as the killing of the horse by the defendant might be equally attributed to the commission of malicious mischief, defined in Section 1969, L. O. L., or to a desire to conceal the alteration of a brand, defined by Section 1954, or to the destruction of stolen property to aid in evading the consequences of the larceny, an instruction that, if the jury found from the evidence beyond a reasonable doubt that defendants killed the horses in question for the purpose of concealment, they might consider the same as tending to show the guilt of defendant of the charge of the indictment, was error, since, if the conclusion to be drawn from the circumstances in question is equivocal, it is for the jury alone to say what influence and what direction shall be accorded the evidence on the point.

Criminal Law—Evidence—Judicial Notice.

8. It is common knowledge, not requiring expert testimony, that a putrescent or desiccated carcass has been dead longer than one the flesh of which presents no indications of decay.

Criminal Law—Evidence—Admissibility.

9. Whether the body is stiff or relaxed, whether the gases of decomposition have distended it or not, the temperature and moisture

prevalent at the time, as well as other factors, are phenomena to be considered in estimating how long a body probably has been dead.

Criminal Law—Experts—Qualification.

10. In a prosecution for larceny of two horses from the range in which it appeared that the horses had been found dead after they were discovered in the possession of the defendant by the prosecutor, in the absence of testimony as to whether the witnesses who had butchered cattle, sheep or hogs had made any systematic or extended observation as to the condition of the carcasses and surrounding circumstances, their opinion as to how long the horses had been dead should not have been admitted.

Criminal Law—Experts—Qualification.

11. In any event they should have described to the jury the appearance and *indicia* upon which they based their judgment, since even an expert cannot give an opinion upon facts not communicated to the jury.

From Wasco: WILLIAM L. BRADSHAW, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

Ewen McLennan was indicted with another for the crime of larceny of two geldings alleged to be the property of C. E. Matthews. The codefendant was acquitted, but, the verdict being adverse to McLennan, he appeals from the consequent judgment.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Francis V. Galloway*.

For the State there was a brief over the names of *Mr. George M. Brown*, Attorney General, *Mr. Wells A. Bell*, District Attorney, and *Mr. Robert R. Butler*, with an oral argument by *Mr. Brown*.

MR. JUSTICE BURNETT delivered the opinion of the court.

The state gave evidence to the effect that Matthews raised the horses and turned them out on the range in the spring of 1914; that he saw them at intervals between then and August of the following year; that on

November 24, 1915, he saw them in the pasture of the defendant with the brand of the latter on their shoulders in the place where his own brand had been previously placed; that he immediately went to McLennan's residence in his absence and left a note with an employee demanding in effect that the defendant return the horses to Matthews at once and settle. This demand was not communicated to McLennan until two days afterward at Two Springs, when he forthwith sent word to Matthews that he would have the horses at his home place and Matthews could come and look them over. Soon after, and on the same day the defendant received the information of Matthews' demand, he and his codefendant left Two Springs en route for McLennan's home place. They passed through the pasture where Matthews claimed to have seen his geldings and gathered up a lot of horses there, except two belonging to a man named Wilson, and drove them to McLennan's residence. The following day, November 27th, McLennan being away from home again, Matthews came there for the purpose of inspecting the horses, but, not finding there the two he claimed, he went on to the pasture where he had seen them three days before, and in his search found their carcasses in a canyon decapitated and the brand skinned off. A witness named Kirsh testified, in substance, that in May, 1915, at a place about eight miles from Matthews' and four miles from McLennan's, he saw a horse which the former claimed and which answered generally in description to one of the horses in question, there being no brand upon him, and that later on in August he saw this same horse in McLennan's field with the latter's brand upon the left shoulder.

A witness named Bates Shattuck was allowed to testify over the objection of the defendant that after the finding of the indictment McLennan came to interview him. What then occurred is best stated in the language of the witness:

“Why, Mr. McLennan evidenced a desire, of course, mentioned the case, and evidenced a desire to get it settled out of court if possible on account of its coming at his very busy time of the year, and there was nothing definite stated one way or the other. * * This indictment having been brought up against Mr. McLennan, he wished to get it settled and over with if possible, and that is the reason it was mentioned to me. Of course, there was nothing definite said about it, except he wishes a settlement, if possible, out of court.”

The defendants' counsel moved to strike out this testimony. The court said:

“I will sustain the motion and strike that out. The jury need not consider that.”

After some further parley between counsel and the court the judge then said:

“I will withdraw that from the jury; they need not consider it.”

Among other things, the court instructed the jury thus:

“I charge you that, if you find from the evidence in this case beyond a reasonable doubt that the defendants killed the horses in question for the purpose of concealment, you may consider the same as tending to show the guilt of the defendants of the charge in the indictment”

—to which instruction the defendants excepted. Some of the witnesses who had from time to time butchered cattle, sheep and hogs were permitted to give their

opinion from an inspection of the carcasses of the horses about how long they had been dead.

1, 2. The defendant imputes error to the trial court in refusing to strike out the testimony of the witness Kirsh. This testimony was competent to show the acts of ownership exercised by Matthews over the animal mentioned from which the presumption might arise that it was his property. The declarations of Kirsh were also admissible to show that the property was afterward found in the possession of McLennan, because it was in his pasture with his brand upon it. It is referable to the doctrine of recent possession of stolen property being admissible as a circumstance to be considered in trial of a charge of larceny. The objection of the defendant ran rather to the weight than to the competence of the testimony. There was no error in refusing to withdraw it from the jury.

3. There are at least two reasons why the statement of Shattuck relating to his interview with the defendant was not admissible in evidence. In the first place, it does not impute to McLennan any utterance whatever. The witness said the defendant "evidenced a desire" to get the case settled, but does not say what act or speech there was which would amount to "evidence" in the judgment of the court.

4. Again, there is nothing inculpatory in wishing to get the case settled. A fair trial would effectually "settle" the matter, and that is a constitutional right of the accused for the assertion of which he cannot be blamed.

5. The testimony of Shattuck, therefore, was not admissible, and the Circuit Court was right in withdrawing it from the jury. The court having done all it could in the matter, the question is whether the defendant's rights were not abused beyond repair not-

withstanding the ruling of the judge. It is easy to conceive a case where an adroit and overzealous prosecutor might put in evidence incompetent matter which would be very damaging to the accused in the estimation of the jury, and yet technically, but not actually, the error would be obviated by excluding the same from their consideration.

Adverting to the discussion of this point by Mr. Justice McBRIDE in *State v. Rader*, 62 Or. 37, 40 (124 Pac. 195, 196), it is at least doubtful whether the fault was cured by striking out the evidence now under discussion. It is there said:

“While in some cases an express instruction to the jury to disregard testimony injuriously admitted is properly held to cure the error, yet the courts are cautious in the application of this rule. It is not an easy task to unring a bell, nor to remove from the mind an impression once firmly imprinted there, and the withdrawal of the testimony should be so emphatic as to leave no doubt in the mind of the juror as to the unequivocal repudiation by the court of the erroneously admitted matter, and even then, in a case where the testimony is evenly balanced or contradictory, courts hesitate to sanction such withdrawal, though it seems absolutely necessary to permit this course in some instances.”

The case is not like that of *State v. Aiken*, 41 Or. 294 (69 Pac. 683). There at the trial of one defendant the court admitted the statements of another jointly indicted, but not on trial, made after the homicide had been committed with which they were jointly charged. Without specifying the particular statement so as to directly call the attention of the jury to it, the court in the general charge said, in substance, that the jury must not consider any remark made by one of the defendants in the absence of the other after the homicide had been committed. In an opinion by Mr.

Justice MOORE it was decided that this was not sufficiently certain as a withdrawal to call the attention of the jury to the particular obnoxious evidence, and so reversed the case. In this instance, while the testimony was directly before the court and at the time it was offered and rejected, the judge plainly said to the jurors that it was withdrawn from their consideration and that they need not consider it. This is clearly sufficient for all practical purposes to bring before the minds of the jury what is taken away from their examination. The procedure is to be criticised, if at all, only on the lines laid down in *State v. Rader, supra*, and, as it is likely that the error will not occur again, it is dismissed with this comment: Prosecuting officers should not be swift to get improper testimony before the jury, lest a formal withdrawal of it afterward fail to prevent a reversal of the ensuing conviction.

6. Complaint is made that the court permitted evidence to go to the jury indicating that the defendant had changed the brand on the animals and that he was concerned in the killing of them. It is claimed that this tends to prove distinct crimes, separate from the one mentioned in the indictment. In *State v. O'Donnell*, 36 Or. 222 (61 Pac. 892), Mr. Justice MOORE summarized the exceptions to the general rule that evidence of crimes other than that charged in the indictment is inadmissible. He wrote in part as follows:

“(1) If several similar criminal acts are so connected by the prisoner, with respect to time and locality, that they form an inseparable transaction, and a complete account of the offense charged in the indictment cannot be given without detailing the particulars of such other acts, evidence of any or all of the component parts thereof is admissible to prove the whole general plan. * * (3) If the facts and circumstances

tend to show that the prisoner committed an independent dissimilar crime, to enable him to perpetrate or to conceal an offense, such evidence is admissible against him upon an indictment charging the auxiliary crime, when the intent to perpetrate or conceal such offense furnished the motive for committing the crime for which he is put upon trial."

Within the meaning of the doctrine thus announced there was nothing in the testimony under discussion to take it from the jury. If the defendant stole the horses, it would be natural within human experience that he would change the brand upon them by putting on his own, or that, when detection appeared to be imminent, he would endeavor to hide the *indicia* of his crime by slaughtering the animals and disfiguring their bodies. All those things might be part of the general plan of the defendant. At least, the jury was entitled to consider them under proper instructions to that end.

7. Killing the horses might be equally attributable to one of three things: (1) To the commission of malicious mischief defined in Section 1969, L. O. L.; (2) to the desire to conceal an alteration of a brand defined by Section 1954; or (3) to the destruction of stolen property to aid in evading the consequences of the larceny. In any event its value as a circumstance in the case was equivocal. Under such conditions it was for the jury to determine whether it was applicable to support the charge of stealing. Where the evidence of the killing could be applied equally well to one of three possible conditions, the court in a measure intruded upon the prerogative of the jury by giving particular direction of this evidence toward one of those theories to the exclusion of others. The instruction quoted gave impetus to the evidence on that point toward proving a theft. The court cannot

say as a matter of law that the testimony "tends to prove" or points in a certain direction when any other conclusion may be drawn from it with equal propriety. In other words, if the circumstance relied upon is alike referable to several theories besides the one in question, the court is wrong in giving it a trend toward the accusation by saying it tends to prove it. Saying to a jury that certain evidence "tends to prove" the guilt of a defendant is sharply criticised by the opinion in *State v. Rader, supra*. The matter is analogous to the doctrine laid down in *Spain v. Oregon-Washington R. & N. Co.*, 78 Or. 355 (153 Pac. 470). That was an action against the railway company for ejecting plaintiff from its cars whereby he suffered an injury to one of his arms yet unhealed from a former amputation and was compelled to submit to another operation of the kind. From the testimony it was uncertain which of several causes produced the inflammation requiring the second amputation. It was there said:

"When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case should be withdrawn from their consideration."

Here the court diverted the attention of the jury from other things to which the killing of the animals was properly referable, and pointedly told them that the circumstance of the killing, if proved, was to be considered as tending to show the guilt of the defendants of the charge of larceny. They were entitled to classify it as tending to show an independent crime disconnected from any larcenous intent which would be to the advantage of the defendant on his trial for theft. They were directed away from that favorable

field of investigation to the injury of the defendant's rights.

In *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138 (77 Pac. 515), the court had under consideration a charge of negligence whereby the plaintiff was injured. The rule is thus stated in the opinion:

"The burden of proof is upon plaintiff, and is not satisfied if the conclusion to be reached from the testimony offered is merely a matter of conjecture. If such conclusion be equally consonant with the truth of the allegations, and with some other theory or theories inconsistent therewith, it becomes a mere conjecture, and the rule of the burden of proof is not satisfied. * * If the conclusion to be reached from the testimony is equally consonant with some theory inconsistent with either of the issues to be proven, it does not tend to prove them, within the meaning of the rule above announced. The use of the word 'tend' does not contemplate conjecture. It contemplates that the testimony has a tendency to prove the allegations of the complaint, and not some other theory inconsistent therewith."

It is only where the testimony points to a definite conclusion and to no other that the court is authorized to say to the jury that it "tends" to prove anything. If the conclusion to be drawn from the circumstance in question is equivocal, it is for the jury alone to say what influence and what direction shall be accorded to the evidence on the point. What is here written on this point is not in conflict with *State v. Brown*, 28 Or. 147, 163 (41 Pac. 1042); *Coos Bay R. R. Co. v. Siglin*, 34 Or. 80, 84 (53 Pac. 504), and *Smitson v. Southern Pacific Co.*, 37 Or. 74, 104 (60 Pac. 907), where it was decided, in substance, that under proper circumstances the court may say to the jury that there is testimony "tending to prove" certain things. In those cases the evidence, if believed, had no double

or treble significance as the testimony under consideration here.

It is not deemed necessary to discuss whether more is shown than that the defendants merely had opportunity to kill the horses nor to determine whether the inhibition against founding a presumption upon an inference applied to the case in hand. Suffice it to say that, if it was legally proved that the defendants killed the horses, the jurors would be authorized to consider that fact in connection with other circumstances for what they might deem it to be worth in deciding upon the guilt or innocence of the accused.

8, 9. The fact that witnesses had butchered cattle, sheep or hogs did not necessarily qualify them to give an expert opinion about how long the horses had been dead. It is common knowledge, not requiring expert testimony, that a putrescent or desiccated carcass has been dead longer than one the flesh of which presents no indications of decay. Whether the body is stiff or relaxed, whether the gases of decomposition have distended it or not, the temperature and moisture prevalent at the time, as well as other factors, are phenomena to be considered in estimating how long a body probably has been dead: 1 Witthaus & Becker, Med. Jur. 923.

10, 11. In the absence of any testimony about whether the witnesses on this point had made any systematic or extended observation of such things, their opinion about how long the horses had been dead ought not to have been admitted. In any event they should have described to the jury the appearances and *indicia* upon which they based their judgment; for, according to *State v. Simonis*, 39 Or. 111, 116 (65 Pac. 595), even an expert cannot give an opinion upon facts known to him and not communicated to the jury.

The other assignments of error are unimportant, but for those discussed the judgment is reversed.

REVERSED.

MR. JUSTICE MOORE and MR. JUSTICE HARRIS CONCUR.

MR. JUSTICE BEAN delivered the following dissenting opinion:

I am unable to concur in that part of the opinion which sanctions the ruling of the trial court in holding that the evidence relating to the so-called compromise was inadmissible, and directing the jury not to consider the same. The defendant McLennan was indicted for a felony, the larceny of horses. The witness Bates Shattuck, a merchant, in answer to the question, "What was the conversation between you and Mr. McLennan about this case?" said:

"Why, Mr. McLennan evidenced a desire, of course, mentioned the case, and evidenced a desire to get it settled out of court if possible on account of its coming at his very busy time of the year, and there was nothing definite stated one way or the other."

Upon not being heard by all the jurors and requested to again tell the jury, the witness said:

"This indictment having been brought up against Mr. McLennan, he wished to get it settled and over with if possible, and that is the reason it was mentioned to me. Of course, there was nothing definite said about it, except he wished a settlement if possible out of court.

"Q. He wanted you to approach Mr. Matthews about a settlement?

"A. I was a friend of both parties, and I did that.

"Q. It was by reason of this conversation you had with him you approached Mr. Matthews to settle the case?

"A. Yes, sir."

The witness does not attempt to give the exact language of the defendant, but it is clear from the evidence that he desired and was endeavoring to arrange for a settlement out of court of the criminal action against him after he was indicted, and the jury might reasonably so infer. It is contended by counsel for defendant that in criminal as in civil cases an offer of compromise is inadmissible under Sections 879 and 1533, L. O. L. The last section provides that:

“The law of evidence in civil actions is also the law of evidence in criminal actions and proceedings, except as otherwise specially provided in this Code.”

But it is otherwise distinctly provided in relation to compromising a felony. Section 1460, L. O. L., enacts:

“A person may be indicted for having, with the knowledge of the commission of a crime, taken money or property of another, or a gratuity or a reward, or an engagement or promise therefor, upon an agreement or understanding, express or implied, to compound or conceal the crime, or to abstain from a prosecution therefor, or to withhold any evidence thereof, though the person guilty of the original crime has not been indicted or tried.”

The compounding or concealing of a crime is also punishable under Section 2040, L. O. L. Under our statute (Sections 1696 to 1698) only the settlement of a misdemeanor may be made between the parties themselves with the sanction of the court. Section 1699 reads thus:

“No crime can be compromised, nor can any proceeding for the prosecution or punishment thereof be stayed upon a compromise, except as provided in this chapter.”

In his work on Criminal Evidence (Section 117) Mr. Underhill says that:

"The rule excluding compromises in civil suits does not apply to criminal proceedings."

See, also, *State v. Soper*, 16 Me. 293, 295 (33 Am. Dec. 665), where Mr. Justice EMEY said:

"We are not aware that the rule of excluding offers of compromise from being heard in evidence applies to criminal cases. They are not to be compounded. It is not under a searching investigation of acts of larceny, that it is intended a man may buy his peace."

And *State v. De Berry*, 92 N. C. 800, the syllabus of which reads thus:

"Where the prisoner, being in jail on a criminal charge, told a party to see the prosecutor and find out if he would consent that the defendant receive 39 lashes and be discharged, held, that such message is relevant and admissible in evidence."

See 8 R. C. L., § 189.

The language of the defendant imports a different wish than a desire to have the case tried in a lawful manner. For the reason that he desired to "get the case settled out of court" he mentioned the matter to Mr. Shattuck. The evidence tended to show an unlawful attempt to compromise or arrange for a settlement of a felony, in order to stifle prosecution, which is inhibited by the statute, and was relevant to show a consciousness of guilt: 12 Cyc. 398. The ruling of the trial court that the jury should not consider the evidence of Shattuck quoted above was favorable to the defendant.

In regard to the portion of the charge to the jury as follows: "I charge you that, if you find from the evidence in this case beyond a reasonable doubt that the defendants killed the horses in question for the purpose of concealment, you may consider the same as tending to show the guilt of the defendants of the

charge in the indictment"—it seems that the scholarly discussion of Mr. Justice BURNETT leaves out of consideration the language of the trial court in effect directing the jury that in order for them to consider the matter of the killing of the horses, they must first "find from the evidence in this case beyond a reasonable doubt that the defendants killed the horses in question for the purpose of concealment."

Therefore the question of the purpose of the killing of the horses was left to the determination of the jury. If the killing was done by defendant for the purpose of concealment, it is difficult to conceive how the matter of wanton injury to animals in violation of Section 1969, L. O. L., which, like the crime charged in the indictment, may be punished as a felony, would figure in the case. The difference between larceny by altering a mark or brand upon horses under Section 1954, L. O. L., and larceny of such animals by stealing under Section 1950, L. O. L., is so slight that a defendant would receive but little comfort in claiming any distinction in that respect under the evidence in this case. Nor would defendant be prejudiced in any way by the trial court's failure to consider the crime of larceny by altering brands. Indeed, the minimum penalty for the latter crime is greater than the minimum for that with which the defendant is charged. If a defendant should assert that the evidence showed he was guilty of the former crime instead of the latter, it might well be said "that the last state of that man is worse than the first." The words "you may consider the same as tending to show," appearing in the latter part of the instruction above quoted, are inapt, and, if taken alone, possibly might be misunderstood by the jury. They are subject to the criticism applied in *State v. Rader*, 62 Or. 37 (124 Pac. 195). Never-

theless, when such an instruction is coupled with a charge that the jurors are the "exclusive judges of the weight and value of the evidence given upon the trial," as the jury was instructed in this case, it comes within the sanction of *State v. Brown*, 28 Or. 147 (41 Pac. 1042), which was a trial for murder in the first degree, as well as within the other cases cited in the majority opinion. An appellate court should not reverse a judgment of conviction without very cogent reasons when the trial court in charging the jury has adhered to the opinion of the higher court.

Over the objection of defendant's counsel certain witnesses who saw the horses soon after they were killed were permitted to state how long they thought the animals had been dead, to the effect that they looked as though they had been killed the day before. The condition of the carcasses of the animals where the brands had been skinned off and the heads severed would be extremely difficult to describe to the jury so that they could approximate how long the brutes had been killed before they were found. The language of the learned majority opinion upon this question based upon a work of medical jurisprudence illustrates this fact. The plainest way for the witnesses to say how fresh the meat was would be for them to say how long the bodies of the horses appeared to have been dead. An ordinary witness could do this. The ordinary observer—the "man in the street"—is qualified if it affirmatively appears to the presiding judge that he has had sufficient opportunities for drawing the inference which he proposes to state and the capacity necessary to make and state it. Where the statement, therefore, is largely one of fact, or the ground of necessity compelling the admission is that the jury cannot draw the inference themselves because the facts

cannot be fully stated, the qualification of the witness consists, not in skill or special experience, but in the fact that he has had satisfactory data: 17 Cyc., pp. 34, 35. Facts which are made up of a great variety of circumstances, and a combination of appearances which, from the infirmity of language, cannot be properly described, may be shown by witnesses who observed them; and where their observation is such as to justify it, they may state the conclusions of their own minds. In this category may be placed matters involving magnitude or quantities, portions of time, space, motion, gravitation, value and such as relate to the condition or appearance of persons and things: 8 R. C. L., § 186. Mr. Wharton says at page 959 of his work on Criminal Evidence:

“Where any material facts are stated by the witness as warranting the inference that he has sufficient knowledge to form an opinion, it is relevant, but such conclusion must arise from the witness’ own personal observation of the facts.”

The men had had experience in butchering and handling the meat of animals. A witness may be qualified by practical experience in a field of human activity conferring on him an especial knowledge not shared by men in general from whom the jury is drawn: 17 Cyc. 37.

I am of the opinion that there was no reversible error as assigned in admitting such testimony or in the trial of the cause, and that the judgment should be affirmed.

Argued November 1, affirmed December 19, 1916.
Modified on petition for rehearing January 30, 1917.

McCOMAS v. NORTHERN PAC. RY. CO.*

(161 Pac. 562; 162 Pac. 862.)

Public Lands—Railroad Grant—Title.

1. Act Cong. July 2, 1864, c. 217 (13 Stat. 365), granting land to aid in the construction of the Northern Pacific Railroad, operated as a present grant beginning with the date when the plat of the road was filed in the office of the Commissioner of the General Land Office June 29, 1883, so that *eo instanti* the title of the grantee in all of the land to which the statute applied vested.

Public Lands—Swamp-lands—Railroad Grant—"Claim."

2. Under Act Cong. July 2, 1864, granting lands to aid in the construction of the Northern Pacific Railroad free from pre-emption or other claims at the time the line of the road was definitely fixed and a plat filed in the General Land Office, the filing of the swamp-land list by the State of Oregon under act of Congress approved September 28, 1850, c. 84 (9 Stat. 519), applicable to that state by Act March 12, 1860, c. 5 (12 Stat. 3), constituted a "claim" excluding such land from the operation of the railroad grant.

Adverse Possession—Color of Title—Deed.

3. The grantee of lands from the State of Oregon which the state had acquired under the swamp-land acts, Act Cong. September 28, 1850, as extended by Act Cong. March 12, 1860, who at once entered into possession, had color of title under his deed.

Public Lands—Mineral Selections—Statute.

4. Under the express provision of Act Cong. July 2, 1864, granting lands to aid in the construction of the Northern Pacific Railroad, the indemnity in lieu of mineral lands must be taken out of unoccupied agricultural lands.

Public Lands—Railroad Grant—Withdrawal—Effect.

5. Under Act Cong. July 2, 1864, granting land to aid in the construction of the Northern Pacific Railroad, and excluding mineral lands and in lieu thereof giving a selection out of unoccupied agricultural lands, the cancellation or rejection of swamp-land list filed by the State of Oregon under Act Cong. Sept. 28, 1850, as extended by Act Cong. March 12, 1860, constituting such a claim as to exclude the land from the railroad grant, would not operate to extend the grant over a disputed tract in the matter of filing indemnity selections.

*Authorities passing on the question of jurisdiction of State courts over lands of United States are collated in a note in 17 L. E. A. 720.

ON PETITION FOR REHEARING.

Adverse Possession—Public Lands—Grant from United States.

6. In view of Act Cong. Feb. 14, 1859, c. 33 (11 Stat. 384), admitting Oregon into the Union, Section 4 of which provides that the people of the state shall provide by an ordinance irrevocable without consent of the United States that the state shall never interfere with the primary disposal of the soil within the same by the United States, when the United States issued patents to land, it thereby made a primary disposal of the soil, and the title so transferred was no more immune from the attack of the state courts than if such conveyance had been executed by a private party, and could be defeated by showing of title by adverse possession.

Courts—Jurisdiction—State and Federal Courts—Swamp-lands—Title.

7. Where the state's selection of swamp-lands was rejected by the General Land Office, and no patent for any part of the land has ever been granted, title thereto is in the United States, and while it so remains a state court is powerless legally to interfere therewith.

Courts—State Courts—Jurisdiction—Government Lands.

8. Although a state court is powerless to interfere with the title of the United States to lands, when two parties are seeking to obtain title to government lands, it is the duty of the court to protect the possession of him who apparently has the better right until the controversy can be adjudicated by the agencies appointed by the United States for that purpose.

[As to acquisition of title to land within railroad right of way by adverse possession, see note in Ann. Cas. 1916D, 1186.]

From Umatilla: GILBERT W. PHELPS, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is a suit by E. W. McComas against the Northern Pacific Railway Company, a corporation, the Farmers' Loan and Trust Company, a corporation, trustee, and other persons unknown to plaintiff, to quiet title to certain lands in Umatilla County. The plaintiff asserts title by prescription.

The defendants claim under the act of Congress of July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern route": 13 U. S. Stats. at

Large, p. 365. From a decree in favor of the plaintiff, the defendants appeal.

AFFIRMED. MODIFIED ON REHEARING.

For appellants there was a brief over the names of *Mr. Charles A. Hart* and *Messrs. Carey & Kerr*, with an oral argument by *Mr. Hart*.

For respondent there was a brief over the name of *Messrs. Raley & Raley*, with an oral argument by *Mr. James H. Raley*.

MR. JUSTICE BURNETT delivered the opinion of the court.

Although other lands are included in the complaint, the parties stipulated disposing of the title to all except the following: Lots 2 and 4 of section 5, and lots 1 and 2, the north half of the northeast quarter, and the northeast quarter of the southeast quarter, of section 7, all in township 5 north, range 30 east, Willamette Meridian. There is substantially no dispute about the facts in the case.

1. Section 3 of the congressional enactment mentioned reads, in part, as follows:

“That there be, and hereby is, granted to the ‘Northern Pacific Railroad Company,’ its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated,

and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * * Provided, further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided. * * *

The line of the road was definitely fixed, and the plat thereof filed in the office of the Commissioner of the General Land Office June 29, 1883. This act has been construed to operate as a present grant beginning with that date, so that *eo instanti* the title of the grantee vested in all lands to which the statute applied.

2, 3. It appears that the Governor of Oregon, operating under "An act to enable the State of Arkansas and other states to reclaim the swamp-land within their limits," approved September 28, 1850, and made applicable to the States of Minnesota and Oregon by the act of March 12, 1860, filed with the proper authorities of the general government in 1872 a list of lands, including those in controversy, which it claimed were swamp-lands inuring to the State of Oregon under the acts of Congress last mentioned. On August 10, 1892, and March 15, 1895, the State of Oregon conveyed these lands to the plaintiff's predecessors in interest from whom by mesne conveyances he de-

raigns title. The grantees in those deeds at once entered into possession of the realty therein described, and they and their successors in interest have continuously maintained that tenure until the present time, claiming title and have made improvements on the premises amounting in value to \$10,000 and upward. As before stated, the plaintiff contends that this constitutes adverse possession under color of title which vests in him the fee-simple estate as against the defendants, although, as the fact appears to be as to some of the disputed subdivisions, the swamp-land claim of the State of Oregon has never been adjusted, while as to others it has been rejected by the officers of the general government. It is agreed that all the realty in question lies within the 40-mile place limits of the railway line, so that if no claim existed against it at the time the line of the road was definitely fixed it would be among the 20 alternate sections per mile on each side of the designated line of road. The contention of the defendants is that the presence of the state's swamp-land list in the proper United States Land Office constituted a claim against the land which took it out of the operation of the grant with the result that the tracts were part of the public domain and not subject to holding by adverse title. Some of this very land was patented to the defendant railway company, which, assuming that the patent had been issued inadvertently, quitclaimed the property to the United States, and then, after the commencement of this suit, filed in the United States Land Office at La Grande what it termed mineral indemnity selections covering the most of the premises in controversy. The defendants say these selections have been approved and depend upon them for their title to the land.

Conceding, as the precedents seem to hold, that the filing of the swamp-land list by the State of Oregon constituted a claim within the meaning of the railway grant excluding the lands from its operation proves too much for the defendants. The plaintiff has clearly established color of title by deed from the state for the very land. He derails title from this source which the defendants say took the property out of the operation of the grant. It is beyond question that the property has been in the exclusive possession of the plaintiff and his grantors under this color of title for more than ten years prior to the commencement of the suit.

4, 5. The authority for filing mineral indemnity selections is found in the provision of the congressional statute "that all mineral lands be and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided," that is to say, "no more than ten miles beyond the limits of said alternate section." The indemnity, therefore, must be taken out of unoccupied agricultural lands; but this land has been in fact occupied all this time. Moreover, in *Bardon v. Northern Pacific R. R. Co.*, 145 U. S. 535, 545, 36 L. Ed. 806 (12 Sup. Ct. Rep. 856, 860), the Supreme Court of the United States, speaking by Mr. Justice FIELD, in construing this same legislation, said:

"Not only does the land once reserved not fall under the grant should the reservation afterward from any cause be removed, but it does not then become a source of indemnity for deficiencies in the place limits. Such deficiencies can only be supplied from lands within limits designated by the granting act or other law of Congress."

In *Northern Lumber Co. v. O'Brien*, 204 U. S. 190, 51 L. Ed. 438 (27 Sup. Ct. Rep. 249), the act was again under consideration. A claim to certain lands within the 40-mile place limit prescribed by the grant made before the Northern Pacific Railway Company had filed its map of definite location was found to be ineffectual, although an order of the Land Department withdrawing it from the category of public lands had been predicated upon it. Under these conditions, Mr. Justice HARLAN, speaking for the court, said:

“When the withdrawal order ceased to be in force, the lands so withdrawn did not pass under the latter grant, but became a part of the public domain, subject to be disposed of under the general land laws, and not to be claimed under any railroad land grant.”

If the filing of the swamp-land list therefore constituted such a claim as to exclude the land from the operation of the railroad grant, the cancellation or rejection of that list would not operate to extend the grant over the disputed tract. In other words, the grant does not purport to affect or attach to any subsequent status of the title. On the other hand, if the mere filing of the swamp-land list did not affect the title granted *in praesenti* by the congressional enactment, the holding of the plaintiff and his grantors has been clearly adverse for sufficient length of time to ripen into a fee-simple estate as against the defendants. Still further, under the authority of the *Baron Case*, the indemnity selections could not be made from any land except what had always been exempt from any claim excluding it from the provisions of the act in the first place. In default of other legislation, the grant embodied in the act of July 2, 1864, attached at the date of the filing of the plat of definite location or never. Whatever the general government

afterward might do toward extinguishing the claim of the state under its swamp-land filing or the assertion of title by the plaintiff it would not inure to the benefit of the defendants in the matter of filing indemnity selections. The act evidently applied to virgin public domain and to no other, both in the original taking and in subsequent indemnity selections.

The plaintiff comes within the reason of the rule of *Boe v. Arnold*, 54 Or. 52 (102 Pac. 290, 20 Ann. Cas. 533), to the effect that one may enter upon public lands, and by holding the same adversely to all persons except the government may acquire title thereto as against those other parties. Under the authorities quoted, it is clear that the rights of the defendant under the act of July 2, 1864, never attached to this land, and that it had no right to include it subsequently in its indemnity selections. It is also equally plain that as between the parties to this suit the adverse possession of the plaintiff and his grantors for more than ten years has vested the title in the latter as against the company.

The decree of the Circuit Court is affirmed.

AFFIRMED.

Modified on petition for rehearing, January 30, 1917.

ON PETITION FOR REHEARING.

(162 Pac. 862.)

Mr. Charles A. Hart and Messrs. Carey & Kerr, for the petition.

Messrs. Raley & Raley, contra.

In Banc. MR. JUSTICE MOORE delivered the opinion of the court.

In a petition for a rehearing it is contended that the defendant, the Northern Pacific Railway Company,

which will hereafter be called the company, holds a legal title to only one of the disputed tracts of land, that the United States is vested with such title to the other parcels of the controverted real property, of which latter premises the state courts have no jurisdiction, and that, this being so, an error was committed in not reversing the decree. The transcript shows that lots 2 and 4 in section 5, lots 1 and 2, the north half of the northeast quarter, and the northeast quarter of the southwest quarter of section 7, in township 5 north of range 30 east of the Willamette meridian, were selected November 23, 1872, as swamp-lands by the State of Oregon, which on August 10, 1892, and March 15, 1895, executed deeds therefor to the plaintiff's grantors and predecessors. The company, asserting a right to these lands by virtue of an act of Congress, received from the United States patents for the northeast quarter of the southwest quarter of section 7, June 8, 1906; for lots 1 and 2 in that section, December 31, 1907; and for lot 2 in section 5, May 4, 1909. After this suit was commenced the company, considering these tracts of land were excluded from the operation of its grant by reason of the state's definite location of swamp-land selection, and assuming that the patents referred to were erroneously issued, executed to the United States, December 4, 1912, a deed for the real property last described, which deed was duly recorded in the proper county. Thereafter the company filed in the local land office at La Grande, Oregon, its mineral indemnity selection for these lands, and on May 25, 1914, pursuant to such choice, it received from the United States a second patent for the northeast quarter of the southwest quarter of section 7. The General Land Office rejected the state's selection of lot 4 in section 5, and

the north half of the northeast quarter of section 7, for which latter real property the company also filed mineral indemnity selections.

6. The former opinion in this cause proceeds upon the theory that the company was unquestionably vested with the naked legal title to the northeast quarter of the southwest quarter of section 7, for which it had received the second patent, but that its right to such land was barred by the adverse occupancy of the premises by the plaintiff and his grantors and predecessors. As to the other tracts for which patents had been received by the company, but which it had attempted to deed to the United States, the naked legal title might well be regarded as being held by the company, notwithstanding the signing and recording of its deed. Like any other contract, a deed, to be valid, requires the *aggregatio mentium* of the grantor and the grantee. In the case before us there is no evidence tending to show that the United States ever accepted that deed, which evidently appears to have been signed and recorded by the company to circumvent the granting of a part of the relief prayed for in this suit. Section 44 of the act of Congress of February 14, 1859, admitting this state into the Union, contains a clause which reads:

“Provided, that the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to *bona fide* purchasers thereof”: 11 U. S. Stats. 383.

When the patents were thus issued the United States thereby made a primary disposal of the soil,

and the title so transferred to the company made it no more immune from attack in the state courts than if such conveyance had been executed by a private party. No error was committed in determining that as to all the real property so patented the company held only the naked legal title, which was defeated by the adverse holding of the plaintiff and his grantors.

7. The state's selection as swamp-land of lot 4 of section 5 and the north half of the northeast quarter of section 7 was rejected by the General Land Office, and the company's selection thereof as mineral indemnity was approved by the local office. No patent for any part of this land has ever been granted, and the title thereto is in the United States. While the title so remains, a state court is powerless legally to interfere therewith.

8. It should be the duty of such a tribunal, however, when it finds two parties who are seeking to obtain the title to government land, to protect the possession of him that apparently has the better right until the controversy can be adjudicated by the agencies appointed by the United States for that purpose: *Kitcherside v. Myers*, 10 Or. 21; *Jackson v. Jackson*, 17 Or. 110 (19 Pac. 847); *Hindman v. Rizor*, 21 Or. 112 (27 Pac. 13); *Pacific Livestock Co. v. Gentry*, 38 Or. 275 (61 Pac. 422, 65 Pac. 597); *Borman v. Blackmon*, 60 Or. 304 (118 Pac. 848).

The decree will therefore be modified so as to enjoin the defendants, their agents, servants, etc., from interfering with or disturbing the plaintiff's possession of the real property last described until the question is determined in the manner suggested. With this alteration the former opinion is adhered to in all respects. AFFIRMED. MODIFIED ON REHEARING.

Argued October 30, affirmed November 21, 1916, rehearing denied January 30, 1917.

McCULLY v. HEAVERNE.*

(160 Pac. 1166; 162 Pac. 863.)

Pleading—Amendment—Complaint—Discretion of Court.

1. The allowance of an amendment to the complaint after the expiration of ten days allowed in which to amend is within the discretion of the trial court.

Trial—Denial of Nonsuit—Cure of Error.

2. The denial of a motion for nonsuit at the close of plaintiffs' case will not be disturbed when the omission, if any, is subsequently supplied by either party.

Judgment—Pleading—Necessity.

3. Estoppel by a former decree is an affirmative defense which must be pleaded in order to be available.

Boundaries—Establishment—Statutory Proceedings—Validity.

4. Where adjoining land owners had their boundary line surveyed, and agreed that the line established should be the boundary line, and acted on such agreement for many years, and defendant took the land subject to such agreement, a proceeding by defendant under Section 2991, L. O. L., against the county surveyor, to establish the boundary, is a nullity as to the adjoining owner.

[As to general rules for the location of boundaries, see note in 129 Am. St. Rep. 990.]

Pleading—Reply—Departure.

5. In a suit to quiet title, where the complaint in the usual form alleges that plaintiffs are the owners, and the defendant sets up ownership and possession in herself, a reply setting up an agreement as to boundary between plaintiffs and the predecessor in title of defendant settling the title to the land in dispute in plaintiff is not a departure.

ON PETITION FOR REHEARING.

New Trial—Newly Discovered Evidence—Effect.

6. In a suit to quiet title, where the weight of the evidence supported plaintiff's contention that he and another agreed upon the line and that a fence was constructed on such line, except where on account of a steep hillside it was necessary to depart from the line, newly discovered evidence that the then wife of such other had heard him say that some day he would have to move the fence out to the line, would not necessarily disprove the existence of the agreement, and hence permission would not be granted to take her testimony.

*For a discussion of the question of acquiescence of adjoining land owners as establishing boundary lines, see note in 4 L. R. A. 643.

Boundaries—Possession—Evidence.

7. In a suit to quiet title involving the ascertainment of boundary lines, the fact that defendant, six months after the commencement of the suit, was attempting to obtain possession by inclosing the land with a fence, was of itself evidence that she did not actually have possession.

From Wallowa: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is a suit by F. D. McCully and J. D. McCully against Elizabeth Heaverne to quiet title.

The complaint is in the usual form in a suit to quiet title to a narrow strip of land a half mile long. It alleges, in substance, that plaintiffs are now, and for many years have been, the owners in fee of the land described; that the defendant is not now, and never has been, in possession thereof, and that it is not now in the actual possession of anyone; that defendant claims and asserts an interest therein adverse to plaintiffs, but such claim is without right; and that she has no title or interest whatever therein. A prayer follows to the effect that she be required to set forth the nature of her claim, and that it be determined by decree of the court that plaintiffs are the owners and entitled to the exclusive possession thereof, and that defendant has no title or interest therein.

The defendant answered with a general denial and affirmative allegation of ownership and possession.

To this answer plaintiffs replied, alleging that in 1883 plaintiffs, being then, as now, the owners of the west half of the northwest quarter of section 32, and one Roberts the owner of the east half of said northwest quarter, the strip of land in controversy being a part of the west half, and said Roberts being the predecessor in interest of the defendant in said east half, the boundary line between the two tracts was unknown, uncertain, undefined and in dispute;

that in 1883 the plaintiffs and Roberts caused the boundary line to be surveyed and located, and mutually agreed that the line so located and established should be the true and final boundary line between their lands; that in the same year upon this agreed line they built a fence, which has been maintained ever since thereon; that by reason of these facts defendant is estopped to claim any interest in the disputed tract. A trial being had, there was a decree for plaintiffs, and defendant appeals.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. Turner Oliver*.

For respondent there was a brief over the names of *Mr. Jerry P. Rusk* and *Mr. A. W. Schaupp*, with an oral argument by *Mr. Rusk*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. Defendant's first assignment of error is based upon the fact that the court permitted an amendment to the complaint after the expiration of the ten days which had been allowed in which to amend. We need only to remark that amendments of pleadings are discretionary, and there is nothing in the record disclosing any abuse of such discretion.

2. It is next contended that the court erred in denying defendant's motion to dismiss the suit when plaintiffs rested their case in chief, for the reason that they had failed to make a *prima facie* one. It is needless to go into the evidence upon this point; for, whatever the condition of the testimony may have been at that time, it was subsequently remedied, and this court has frequently held that a ruling on a motion for nonsuit

will not be disturbed when the omission, if any, is subsequently supplied by either party: *Caraduc v. Schanen-Blair Co.*, 66 Or. 310 (133 Pac. 636).

3, 4. Defendant then urges as error that the court ignored the effect of a former decree in the case of *Heaverne v. Merryman*, as county surveyor, which she insists establishes the boundary line according to her contention, and should therefore estop the plaintiffs from claiming the disputed land. There are two reasons why this assignment is without merit. In the first place, it is an affirmative defense which, in order to be of any avail, must be pleaded, and defendant's answer contains no reference thereto: *Rugh v. Ottenheimer*, 6 Or. 231 (25 Am. Rep. 513); *Gladstone Lumber Co. v. Kelly*, 64 Or. 163 (129 Pac. 763), and cases there cited. The second reason for disregarding this contention is found in the fact that the former suit referred to appears to be a proceeding under the provisions of Section 2991, L. O. L., which was instituted by defendant against the county surveyor in August, 1910. It appears from the evidence that in 1883 the boundary line was uncertain and in dispute; that plaintiffs and defendant's grantor had the line surveyed, and agreed that the line so established should be the boundary line, and acted upon such agreement for many years; that the defendant took the land subject to such agreement. This being so, there was no dispute upon which to base the later proceedings, and as to plaintiffs they would be a nullity: *Egan v. Finney*, 42 Or. 599 (72 Pac. 133).

5. It is also earnestly contended by defendant that the affirmative matter in the reply is a clear departure from the cause of suit set out in the complaint. We cannot agree with this. The complaint alleges ownership generally, and, where the defendant by

answer denies this and sets up ownership and possession in herself, plaintiffs are undoubtedly entitled to set up facts which disclose the manner in which their title became unassailable. We find no inconsistency in the two.

The remaining assignments attack the sufficiency of the evidence to sustain the findings of the trial court. The evidence is voluminous, and, in some details, conflicting, and the trial court had far better opportunity than we to determine where the truth lay. It is sufficient to say that in our opinion, the weight of the evidence supports each of the findings so made, and they will not be disturbed.

The decree of the lower court is affirmed.

AFFIRMED. REHEARING DENIED.

Denied January 30, 1917.

ON PETITION FOR REHEARING.

(162 Pac. 863.)

Appellant's petition for rehearing denied.

Mr. Turner Oliver, for the petition.

Mr. Jerry P. Rusk and *Mr. A. W. Schaupp*, *contra*.

In Banc. MR. JUSTICE HARRIS delivered the opinion of the court.

A re-examination of the testimony brings us to the conclusion announced in the original opinion: *McCully v. Heaverne*, *ante*, p. 650 (160 Pac. 1166). The evidence for the plaintiffs details the circumstances surrounding the survey, explains the setting of the stakes,

and tells about distributing the rails and building the fence. The overwhelming weight of the evidence supports the contention of the plaintiffs that McCully and Roberts agreed upon the line, and that the fence was constructed upon the agreed line except where, on account of a steep hillside or bluff, it was necessary to depart from the line. A petition for a rehearing urges that permission should be granted to take the testimony of Mrs. Ella Averill, a witness recently discovered by the defendant and who in 1882 was the wife of Roberts. She says in an affidavit that she did not know of any agreement between her former husband and McCully concerning the boundary line, and that she once heard Roberts say "that some day he would have to move the fence out to the line." The fact that she did not know of an agreement would have but slight tendency to prove that no agreement was made, especially when it is remembered that there is much affirmative evidence to show that the agreement was made. F. D. McCully testified that the agreement was in fact made; that Vail, who "was the chief surveyor in this section of the country at that time," ran the line in 1882; that the fence was built; that afterward in 1883 Roberts and McCully "called the county surveyor from Union County, Mr. Eugene Chase," and "he established this boundary line" in the presence of McCully, Roberts, Vail and probably W. C. Fleener, and Chase located the line exactly as it had been run by Vail; and that "we agreed that this was the corner as established by the county surveyor, and proceeded from that to lay out the town of Joseph, from that work in the fall of '83." C. L. Hartshorn stated that he helped to get "the rails out, or a portion of them, for building this fence"; that Roberts and McCully

"came out to where they had the stakes set up and stones, and they showed me where to put the rails"; and again, that "Mr. McCully and Mr. Roberts were present there, both of them, and showed me where to put the rails and I distributed the rails along this supposed line."

6. Assuming, but not deciding, that it would be competent for Mrs. Ella Averill to testify that she heard her former husband say "that some day he would have to move the fence out to the line," nevertheless the statement would not necessarily tend to disprove the existence of the agreement. On account of a steep hillside a portion of the fence was not laid upon the agreed line, and consequently Roberts might well have said that it would be necessary at some time to move the fence "out to the line." The declaration ascribed to Roberts is not necessarily inconsistent with the agreement testified to by McCully.

7. The petitioner contends that she was in the actual possession of practically all the disputed land. The suit was commenced in October, 1914. The trial court expressly found from the conflicting evidence that the land "was not at the commencement of this suit in the actual possession of another, and that the same was not at that time in the actual possession of the defendant." It is a noteworthy fact that as late as May, 1915, or six months after the commencement of this suit, the defendant was attempting to obtain possession of the land by inclosing it with a fence, and her attempt thus to gain possession is of itself evidence that she did not actually have possession. As we read the record, the plaintiffs did not make the broad admissions contended for by the defendant. The evidence was conflicting. The trial court had the some-

times incalculable advantage of observing and hearing the witnesses.

The decree was a just one. The petition for a rehearing is denied.

AFFIRMED. REHEARING DENIED.

Argued January 3, affirmed January 30, 1917.

BARNHART v. NORTH PACIFIC LUMBER CO.

(162 Pac. 843.)

Master and Servant—Verdict—Implied Findings.

1. In a servant's action for injuries alleged by defendant to have been caused by the negligence of a fellow-servant, a verdict for the plaintiff implies that the jury found that the injury was caused by defendant's negligence and not that of the fellow-servant.

Trial—Instructions.

2. Refusal of a requested instruction covered by given instructions is not error.

Master and Servant—Evidence—Sufficiency.

3. In a servant's action for injuries, evidence *held* sufficient to take plaintiff's contention as to the cause of his injury to the jury.

Trial—Instructions—Ours by Other Instructions.

4. In a servant's action for injuries, where the court made it clear in another part of the charge that the Employers' Liability Act (Laws 1911, p. 16) only requires the use of practicable devices and precautions, the defendant cannot complain that the court omitted the element of practicability from two of the instructions.

Trial—Cautionary Instructions—Discretion of Court.

5. The giving of cautionary instruction is within the discretion of the court.

From Multnomah: **WILLIAM N. GATENS**, Judge.

Department 2. Statement by **MR. JUSTICE HARRIS**.

Henry Barnhart was injured while employed as an edgerman in a sawmill operated by the North Pacific Lumber Company. The plaintiff obtained a verdict and judgment in an action for damages, and the de-

fendant appealed. The edger is a machine with several saws. There is an open space of about three feet between the edger and a set of dead rolls, and it was the duty of the plaintiff to stand in this open space and adjust the saws and to operate the machine and put lumber through it. The set or line of dead rolls in front of the edger, according to the complaint, is about 12 feet in length. On one side of and about three feet from and parallel with the row of dead rolls is a line of live rolls extending along the mill about 40 feet to the pony saw. The main saw is on one side of the mill and the pony saw on the other. Cants are conveyed from the main saw by means of a traveling crane over to the pony carriage. When a piece of lumber is sawed from a cant by running it through the pony saw, the piece is carried by the live rolls until it arrives at the side of the dead rolls, and then it is transferred from the live rolls to the dead rolls by means of chains fashioned like belts and operated by steam power; the lumber is then shoved along the dead rolls by hand and put through the edger. While engaged in adjusting the edger saws and standing with his back to the set of dead rolls, a piece of lumber on the dead rolls was shoved against the plaintiff, causing his hand to be caught in the edger and injured. In substance, the complaint alleges that a piece of lumber was being conveyed from the pony saw along the live rolls, and, instead of remaining on the live rolls, the forward end of the piece of lumber veered from the line of the live rolls and struck a piece of lumber on the dead rolls, causing the latter piece to be shoved against the plaintiff and thus causing him to be thrown against the edger and his hand to be injured by the machine. The plaintiff avers that his work involved a risk and danger, and that his employer violated the Employers'

Liability Act by failing to install a guard on the live rolls or to provide an offbearer to keep each piece of lumber on the live rolls until it reached the point where it was to be transferred to the dead rolls.

The answer alleges that the defendant was entirely free from negligence, and that the injury sustained by plaintiff was caused solely by the act of a fellow-servant, who shoved a piece of lumber along the dead rolls against the plaintiff.

AFFIRMED.

For appellant there was a brief over the names of *Mr. F. C. Howell* and *Messrs. Wilbur, Spencer & Beckett*, with an oral argument by *Mr. Howell*.

For respondent there was a brief over the name of *Messrs. Giltner & Sewall*, with an oral argument by *Mr. R. R. Giltner*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. For the purpose of this appeal we may assume that both litigants admit that the plaintiff was injured, and that the injury was caused by a piece of lumber on the dead rolls being shoved against him. The point in controversy was whether Tony Mike, a fellow-servant, shoved the lumber against the plaintiff as claimed by the defendant or whether a piece of lumber veered from the live rolls and struck the lumber on the dead rolls as claimed by plaintiff. Speaking to the jury the trial court said:

“If you find from the evidence that the defendant was not guilty of negligence set forth in the complaint under the law referred to, but that the accident happened solely because of the negligence of Tony Mike, then your verdict should be for the defendant.”

The jury returned a verdict for the plaintiff and the verdict implies that the jury found that the injury was caused, not by the negligence of Tony Mike, but by the negligence of the defendant in not installing a guard on the rolls or by failing to provide an offbearer.

2. The defendant complains because the court did not give a lengthy instruction concerning Tony Mike as a fellow-servant and the consequences of an injury caused by him alone; but, since the instruction given by the court told the jury in a few plain words what the requested instruction of the defendant would have told in many words, there can be no room to contend that the defendant was injured.

3. The court properly denied defendant's motion for an instructed verdict. The plaintiff testified thus:

"I was struck on the legs by a piece of lumber on the dead rolls which was pushed forward by another piece of lumber then being carried forward on the live rolls."

Continuing, he stated that he looked around and saw Tony Mike over on the main side of the mill where he had gone to assist in bringing a cant to the pony carriage, and that Tony Mike had been helping to bring cants over to the pony carriage, in the language of the plaintiff, "since I be there." Barnhart also testified that Tony Mike stood at one end of the dead rolls and next to the live rolls, and worked as an off-bearer; "when he got time he worked over there, whenever he had time." There was evidence to sustain the contention of the plaintiff, and, notwithstanding the quantity of evidence to the contrary, he was entitled to have the facts determined by the jury.

At the time of the preparation of the bill of exceptions the defendant insisted that the plaintiff had not testified at the trial that he "was struck on the legs

by a piece of lumber on the dead rolls which was pushed forward by another piece of lumber then being carried forward on the live rolls." The trial court expressly found that the answer was given by Barnhart when a witness. In addition to its appearance in the bill of exceptions, the quoted answer appears in the transcript of the testimony over the certificate of the official reporter; and, furthermore, 11 of the jurors say that the bill of exceptions correctly reports the testimony of Barnhart. Even though it be assumed, without deciding, that the instant case is not governed by *Allen v. Standard Box & Lumber Co.*, 53 Or. 10, 16 (96 Pac. 1109, 97 Pac. 555, 98 Pac. 509), and that the certificate of the trial judge is not conclusive, nevertheless the showing made by the defendant is not sufficient to overcome the finding made by the trial court.

4. The defendant insists that the court committed prejudicial error in omitting the element of practicability from two instructions. The court made it clear to the jury in another part of the charge that the Employers' Liability Act (Chapter 3, Laws 1911) only requires the use of practicable devices and precautions, for the court said:

"The law made it the positive duty of the employer to use, under said circumstances and conditions, every device, care and precaution which it was practicable to use for the protection and safety of the life and limb of plaintiff, limited only by the necessity of preserving the efficiency of the machinery, apparatus or device which was being used, without regard to the additional cost of suitable material, safety appliances or devices."

Afterward the court again told the jury that:

"The question for you to determine is, first, was this a dangerous machine, and, if so, the defendant must use every care, device and precaution to protect the employee from being injured if it is practical to do so.

Of course, you realize that if it is impractical, he is not required to do so."

The defendant has no just ground for complaint when the charge is taken in its entirety.

5. There was no abuse of discretion in refusing to give a cautionary instruction: *Scheurmann v. Mathison*, 67 Or. 419, 424 (136 Pac. 330, 7 N. C. C. A. 1071); *Nordin v. Lovegren Lumber Co.*, 80 Or. 140, 149 (156 Pac. 587); *Childers v. Brown*, 81 Or. 1 (158 Pac. 166).

The judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE BENSON CONCUR.

Submitted on brief January 16, modified and affirmed January 30, 1917.

SHORT v. ROGUE RIVER IRRIGATION CO.

(162 Pac. 845.)

Joint Adventures—Joint Contracts—Extension of Time.

1. In joint contracts neither party can extend the time for performance without the consent of the other.

Joint Adventures—Joint Vendors—Extension of Time.

2. One joint vendor cannot extend time of performance without consent of other.

Tender—Mode and Sufficiency—Pleading.

3. A defendant relying on a plea of tender must show that he had at time of tender, and still has, the means of making the tender good.

[As to sufficiency and effect of tender, see notes in 77 Am. Dec. 470; 30 Am. St. Rep. 460.]

From Josephine: FRANK M. CALKINS, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MCBRIDE.

This is a suit by Maggie E. Short and Charles E. Short against Rogue River Irrigation and Power Company, an Oregon corporation, W. B. Sherman, Chris-

topher Omann, R. E. Lee Steiner, J. G. Riggs, A. N. Parsons, Sam Baker, F. N. Derby, G. A. Knoblauch, F. A. Pierce and Charlotte Pierce, his wife, G. C. Farmer and C. E. Farmer, defendants, to quiet adverse claims to real property and to annul and cancel a certain selling contract made between the plaintiffs and the defendant Sherman. The contract is set up in the complaint, and its essential provisions are as follows: The land included in the contract was the whole of section 20, township 35 south, range 6 west, Willamette Meridian, in Josephine County, with the exception of certain lots and tracts not necessary to be enumerated here. By the terms of the agreement, Sherman was authorized to negotiate sales according to a schedule agreed upon by the parties until June 8, 1911. He was within 15 days from the date of the contract to start an active campaign for the sale of the lands in lots and tracts, surveying, platting and advertising and selling the property at his own expense in such manner as to him might seem best. The lands were to be sold by a schedule to be agreed upon by the parties as soon as the surveying should have been completed at a price to aggregate not less than \$27,500, except by the written consent of the Shorts, upon the following terms: Ten per cent in cash to be paid by the purchaser upon the delivery of a contract of sale to be executed by the Shorts, the balance to be paid in monthly installments of not less than 3 per cent, and deferred payments to draw 6 per cent interest. Sherman was to collect all money from such sales and place the same in a fund to be divided as follows: One half of the money received on each sale to be retained by Sherman as his commission until he had received the amount of 25 per cent of each sale; the remaining 75 per cent to be given to the Shorts in payment for the land sold. The

fund, however, was to be kept intact until the Shorts should be satisfied that all expenditures incurred by Sherman for which they might be liable had been paid out of his commission, and until all indebtedness of the Shorts which might conflict with their ability to make a good conveyance of the land sold should have been paid out of the Shorts' portion of the fund. An accounting was to be made every 30 days. Then followed these clauses:

"Fifth. The first party agrees to sell the property at the price of \$13,800 net to them on the following terms: At least \$4,725 and interest at the rate of 7 per cent per annum shall be paid on or before August 1, 1910, and the balance to be paid from the proceeds of the sale as heretofore provided.

"Sixth. Said first party hereby agrees to issue good and sufficient warranty deeds to any lot or parcel of said land as the same may be paid for by the third party or upon the payment of 50 per cent of the purchase price as a mortgage given for the remainder.

"Seventh. It is expressly understood and agreed that if the party of the second part shall on or before June 8, 1911, pay to the party of the first part from the proceeds of the sale of said lots, parcels, or tracts of land \$6,900 in cash and mortgages covering such property on which 50 per cent of the purchase price has been paid in an amount aggregating \$13,800, as above provided, then and in that event the party of the first part shall promptly as they receive said sum convey all the remaining unsold lots, parcels, or tracts of land to the party of the second part, free and clear of all encumbrances of whatsoever name or nature, it being expressly understood and agreed that the total amount in cash or otherwise to be received by the party of the first part under and by virtue of this agreement is not to exceed the sum of \$13,800.

"Eighth. The party of the second part expressly agrees that he will maintain an active selling campaign on said property during the life of this contract; that he will pay at least \$4,725, with interest at seven per

cent from date hereof, by August 1, 1910, either from the proceeds of the sales, or otherwise, and should he fail to keep actively engaged in the sale of said land or to make the payment as above described, then, and in that event, he shall forfeit all his rights and interests in and to this contract, excepting as to his commissions for the sales already made; and no action at law is necessary to place the title to this property in the hands of the first party the same as before this contract was made.

"Ninth. It is further understood and agreed that nothing herein shall constitute or be considered as an agreement or obligation of any kind on the part of the party of the second part to purchase the above-described property, or any part thereof, nor to pay any amount thereon.

"Tenth. And the parties of the first part hereby agree by and with the party of the second part that they will sell to him all of the property herein designated and described upon his faithful performance of the conditions herein promised and upon the terms and conditions herein specified. Time is expressly declared to be the essence of each and every term, condition or covenant herein, and upon default in the observance of either term, condition or covenant, or the payment of any sum herein mentioned, the second party herein, his heirs and assigns, shall *ipso facto* forfeit all payments made hereunder and all rights acquired herein without notice from the first parties and any sums paid shall be retained and kept by the first parties as liquidated damages and rental for the use of said premises, and upon default the second party shall not be deemed to have acquired any rights in the property mentioned herein by virtue of any payments or things done or performed hereunder, and it shall not be necessary for the second party to begin proceedings at law or equity to determine any rights hereunder, the parties hereto by this instrument determining the rights of each hereunder, and upon the default of the second party in any of the foregoing matters the said forfeiture shall apply to all things contained herein except to commissions already earned."

The complaint alleged that on May 20, 1910, Sherman assigned the foregoing contract to the defendant Rogue River Irrigation & Power Company; that said company paid upon said contract the sum of \$4,725 and interest to August 1, 1910; that neither said company nor any other person had made any other payments nor performed any of the stipulations of said contract required by them to be performed; that the other defendants claim some interest or lien upon said property, but if they have any, it is subordinate to the rights of plaintiffs. There was a prayer that the defendants be adjudged to have no interest or estate in the premises; that the title of plaintiffs be adjudged good and valid; that the defendants be enjoined from asserting any adverse claim to the property; that the agreement be canceled and annulled; that the Rogue River Irrigation & Power Company and Sherman be required to execute quitclaim deeds to the property; and for general equitable relief.

All the defendants except the power company and Sherman made default. The power company answered disclaiming any interest in the property and alleged:

“Because of the damage caused one W. B. Sherman, one of the defendants herein, by reason of the failure of the said Rogue River Irrigation & Power Company to fulfill the promises and agreements made with the said W. B. Sherman, and by reason of which the said W. B. Sherman entered into that written agreement and assignment referred to in the complaint as being recorded in volume 36 of the deed records of Josephine County, Oregon, at page 416 thereof, this defendant consented and agreed with the said W. B. Sherman that the said assignment was and should be canceled, annulled and held void, and the said W. B. Sherman restored to all of his original rights in and to and under the contract between him and the plaintiffs herein set forth in said complaint, and that he, the said W. B.

Sherman, should have and receive the benefit and the credit for all payments made upon the said contract with the plaintiffs by the said Rogue River Irrigation & Power Company, more especially those certain payments heretofore made of \$4,725 principal and payment on the interest up to and including August 1, 1910."

Then followed a general disclaimer. Sherman, who is the sole appellant, answers with a qualified denial of the allegations of the complaint, and then alleges that immediately after the making of the agreement with the plaintiffs he entered upon and continuously thereafter maintained an active campaign for the sale of the lands by surveying, platting, advertising and endeavoring to sell said property, at large expense to himself, and that he had at all times since said date complied with all the requirements of the contract; that said efforts were continued until the twentieth day of May, 1910, when by a written agreement the contract was assigned by them to the Rogue River Irrigation & Power Company, which upon August 1, 1910, paid to plaintiffs \$4,750 upon the purchase price and interest up to August 1, 1910, and that thereafter the said power company continued at great expense to itself to maintain an active campaign for the sale of said property and fully performed every term and condition of the contract between Sherman and the Shorts. The answer then sets forth the agreement between Sherman and the power company, which included the transfer by Sherman of other property and property rights of his own, and alleges that said transfer was procured by false representations and deceit on the part of the company; that said company wholly failed to comply with its part of the contract with defendant Sherman and fraudulently borrowed large sums of money upon the land in section 20 conveyed by Sher-

man to it to Sherman's damage in the sum of \$6,000; that his assignment of the contract in suit should be canceled and declared void; that the power company after its dissolution, acting by and through its former officers and directors, agreed with defendant Sherman by reason of its nonperformance of the contract of assignment before set out he was entitled to be restored to his original position respecting said land and to have the benefit of any and all payments made by it upon said contract, with the plaintiffs, and that upon the discovery of the misrepresentations of the officers of the power company and their agreement to restore him to his original position, which agreement could not be formally entered into in writing because of the dissolution of said corporation, he immediately continued to maintain and prosecute an active campaign for the sale of said lands and performed all the conditions of said contract; that on June 7, 1911, defendant Sherman, in a letter addressed to and received by each of the plaintiffs, offered and tendered to plaintiffs the sum of \$2,175 cash, together with any interest that might be due, and offered and tendered in conformity with said contract \$6,900 secured by mortgages upon said land located in section 20, and said mortgages were delivered at the request of plaintiffs to their agent the Grants Pass Banking & Trust Company, with instructions to deliver them to plaintiffs when plaintiffs should execute warranty deeds conveying good title to the land. It was also alleged that there were encumbrances which rendered the title unmarketable, to wit, an unsatisfied mortgage on the land and another mortgage from F. A. Pierce and wife to G. A. Knoblauch for \$1,100; that the title is further clouded by an agreement executed by F. A. Pierce to William Bowers and by a divorce suit between the plaintiffs in which Maggie E. Short claimed an equitable lien upon the

land; that plaintiffs have never tendered to defendant Sherman a deed conveying a good and marketable title; that defendant Sherman has always been ready and willing to pay the sums due under said contract, has left the mortgages tendered under said contract on deposit at the bank aforesaid as a continuing tender, and has always offered and now offers to pay the actual cash due on said contract after deducting the actual amount of the mortgages therefrom.

The new matter in the answer being put in issue by appropriate denials, there was a trial and findings for the plaintiffs and a decree substantially that, unless defendant Sherman should pay to the plaintiffs within 90 days the sum of \$9,075 with interest at 7 per cent per annum from February 21, 1910, and the costs and disbursements of this suit, the defendant should be barred and foreclosed from all interest in the property, and that within 10 days from the expiration of said redemption period in default of such redemption said defendant should execute a quitclaim deed to plaintiffs of said premises. There was no personal judgment against the defendant. From this decree he appeals.

Submitted on brief under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

MODIFIED AND AFFIRMED.

For appellant there was a brief over the names of *Mr. O. S. Blanchard* and *Mr. C. A. Sidler*.

For respondents there was a brief prepared by *Messrs. Durham & Richard*.

Opinion by **MR. CHIEF JUSTICE MCBRIDE**.

In 1909, Charles E. Short, one of plaintiffs, obtained a written option from F. A. Pierce to purchase the

lands described in the complaint herein for \$6,500, paying the sum of \$25 down. Later he entered into an agreement with his then wife, the other plaintiff herein, that they would make the purchase together; she to advance \$1,000 for his use in paying for the land. He paid the greater portion of this sum to Pierce and received from him a written contract of sale for the sum of \$6,500, less the sum of \$750 already paid, which contract was taken in the name of his wife, and a deed to her from Pierce was at the same time deposited in escrow subject to compliance with the conditions of the contract. As seen by the statement herein, the plaintiffs entered into a contract with defendant Sherman, the substance of which is given in the foregoing statement. In May of the same year, Sherman assigned this contract to the Rogue River Irrigation & Power Company, having previous to that time done little or nothing in the way of attempting to make sales of the property. On August 1, 1910, the power company paid the \$4,725, with interest at 7 per cent, which was applied upon the debt due to Pierce, whereby Mrs. Short became the owner of the legal title. Subsequently there was a divorce suit between the Shorts, and in the decree in that case it was held that Mrs. Short was trustee for Charles E. Short of a half interest in the lands and in the contract of sale now in suit, subject to a lien in her favor against Short for \$1,000, with interest at 6 per cent from March 1, 1909. The agreement between plaintiffs and defendant Sherman has a double aspect: (1) There is an agreement that he may sell so much of his land as could be sold by him prior to June 8, 1911, when his contract would expire by limitation; (2) there was an alternative option permitting him to purchase the land himself within the time specified by paying \$6,900 in cash and

giving mortgages upon the various lots and parcels for the remainder of the purchase price, payable in installments with interest as provided in the contract. It appears that the power company after the assignment attempted to make, or did make, some sales, but upon what terms it does not appear, and failed to put the money if any were received into the funds provided in the contract or to report to the plaintiffs or account to them for any proceeds of the sales. It would appear that they were attempting to deal with the plaintiffs rather under the option clause of the agreement than under the selling clause, and there is some testimony tending to show that Williams the promoter of the company, induced Sherman by fraudulent representations to enter into the organization and assign his interest to the company. At all events, the company dissolved without complying with the terms of the contract, and after such dissolution it appears that there was some verbal agreement between Sherman and the former officers of the corporation, of which Sherman was a stockholder and director, that the contract should be retransferred to Sherman together with all payments made and rights arising by reason of such payments. It is contended by Sherman that he also had a written assignment made later, which he claims had been removed from his files; but this testimony is contradicted by his own answer, which states that it was impossible to make a written assignment by reason of the dissolution of the corporation. So it is doubtful to say the least whether he derives any rights whatever by reason of any informal negotiations between himself and the officers of the defunct corporation, none of whom testified upon this subject. The date of the alleged oral transfer is not given, and whether it was before or after June 8, 1911, is uncer-

tain from the testimony. As defendant could have made it certain, it is only fair to assume that it was subsequent to June 8th.

1-3. Along early in June, probably about the 1st, Sherman asked Mrs. Short for an extension of time; at least, the matter was broached between them and talked over with no actual result. On June 7th he received a telegram from Mrs. Short stating she could give no extension without the consent of Short. On the same date he wrote a letter to Short, and another to Mrs. Short, stating that he had deposited in the bank at Grants Pass mortgages in the amount of \$6,900 and suggested certain alleged defects in the title. The letter also offered to pay the sum of \$2,175 cash on condition that the specified defects in the title should be removed. Before the commencement of this suit, plaintiffs caused these apparent defects in the title to be remedied, of which defendant Sherman was notified; but, instead of paying the money due, he requested plaintiffs' attorney to intercede with plaintiffs and see that more time was granted him, which plaintiffs declined to grant, and deposited a warranty deed to the property in the bank subject to his order upon paying the amount due under the contract. He paid nothing, and the suit was brought. The mortgages which he deposited in the bank were not such as were required by the contract, and were never approved by Mrs. Short; nor was she in any way consulted as to the tracts of land upon which they should be given; nor is there anything in the evidence indicating that she ever extended the time for performance of the contract beyond the mere fact that she did not sooner cause a suit to be brought to foreclose Sherman's right thereunder, if he had any. The contract being joint, neither party could extend the time without the consent of

the other. The delay of plaintiffs for the purpose of correcting apparent defects in the title, which in fact were not real encumbrances but only apparent, probably extended the time for payment until these defects were obviated and the defendant notified of that fact, and the defendant's alleged tender was evidently made in bad faith and for the purpose of securing time, it being plain from the testimony here that he never had the money to make the tender good. In fact, he admits that he had no money, but says that he had arranged to borrow it from his attorney. His attorney was also a witness and did not attempt to corroborate this assertion. The evidence shows that the defendant had against him, and still has against him, judgments which he is unable to pay, and his statements in this respect, like some others made by him in his testimony, cannot be accepted. When written tender is made, a defendant must show that he had at the time, and still has, the means of making the tender good: *Ladd & Tilton v. Mason*, 10 Or. 308; *Holladay v. Holladay*, 13 Or. 523 (11 Pac. 260, 12 Pac. 821); *McCourt v. Johns*, 33 Or. 561 (53 Pac. 601). The defendant has not made any such showing in this case. To sum up, he has forfeited his option, and with it the sums paid by the power company upon it, and the plaintiffs ought not to be compelled to wait longer upon his attempts to retrieve himself by finding a purchaser for the property.

We think the decree of the Circuit Court allowing him to redeem by paying in cash the sums yet due was quite as favorable as the law or the facts in this case warranted. However, we will give him a further opportunity by providing that he may redeem by paying the same sum with accrued interest within 90 days from the entry of the mandate of this court in the Circuit Court, said payments to include in addition the

costs and disbursements of this court; otherwise, the decree of the Circuit Court will be in all things affirmed.

MODIFIED AND AFFIRMED.

Submitted on brief January 17, affirmed January 30, 1917.

RASMUSSEN v. WINTERS.

(162 Pac. 849.)

Adverse Possession—Pleading—Complaint.

1. In a suit involving title to land, a complaint alleging that the plaintiffs have had possession of all the land under color of right and by hostile adverse possession, and that they have been in actual occupancy of all the land, that they have held the land in open, plain and notorious possession against the entire world, and that they have been in continuous possession for more than 11 years, constituted an assertion of title by prescription.

[As to what amounts to color of title sufficient to sustain adverse possession, see notes in 14 Am. Dec. 580; 88 Am. St. Rep. 701.]

Appeal and Error—Change of Theory on Appeal.

2. In a suit involving title to land, where the complaint asserted title by prescription, and the case was tried on that theory, plaintiffs cannot on appeal try the case on the basis of an action to determine a disputed boundary.

Boundaries—Evidence—Sufficiency.

3. In a suit involving title to lands, evidence based on map on which surveyor had noted that the lines do not purport to be established in accordance with the legal subdivisions of quarter sections held insufficient to establish the boundary line as claimed by plaintiffs.

From Clatsop: JAMES A. EAKIN, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

The plaintiffs are the children and widow of Hans Rasmussen, who died intestate August 16, 1906, and who, they say, purchased from one Swan on March 16, 1906, the northwest quarter of the northwest quarter of section 9, township 7 north, range 9 west of the Willamette Meridian, in Clatsop County, Oregon.

They aver that said grantor for ten years prior thereto was the owner in fee and in the adverse possession against all the world of the whole of the property described in the complaint and at issue, and deraign their title by descent from Hans Rasmussen. They state, in substance, that when the surveys of lands in that township were made the surveyor set a certain stake as the northwest corner of section 9. They claim to have had a civil engineer make a survey of the lands which they and their grantor actually occupied for more than ten years prior to the commencement of the suit. The complaint then sets out the following allegation:

“That for more than 10 years prior to the commencement of this suit plaintiffs herein and their predecessors in interest have owned and been in continuous possession and actual occupancy of all of the lands within said northwest quarter of the northwest quarter of said section as indicated on said attached map by said Bennett survey under color of right and under muniments of title as recorded in the office of the county clerk of said Clatsop County, and as shown by said records in the probate of the estate of said Hans Rasmussen, deceased, always save and except that the exact location of the south boundary of said legal subdivision had not been definitely determined by any survey or measurement made by or at the instance of plaintiffs herein or any of their immediate predecessors in interest, other than by said Bennett survey, and that during a long period there had been some doubt as to the precise and mathematically exact location of said south boundary line, but that for more than 11 years prior to the commencement of this suit, plaintiffs herein and their predecessors in interest have continuously held by actual possession and claimed all of the lands by open, plain and notorious adverse possession against the entire world as far south as is shown by the south boundary line thereof on the attachable maps, which south boundary line is 1,320 feet

southerly of said original stake, and on the east have for the same length of time, and by the same hostile adverse possession held and claimed as their own all of the lands as far east as is indicated by the dotted lines marked as 'location of old fence' between said Bennett survey boundary on the south and said slough on the north, and that plaintiffs and their immediate predecessors in interest for more than 11 years last past, being in ignorance of the true and mathematically precise boundary lines on the south and east of said subdivision, claimed and held as indicated irrespective of where said true boundary lines might be or might ultimately be ascertained to be."

They aver that the Bennett survey is made part of the complaint "for the purpose of showing and describing the lands held and claimed by plaintiffs under color of title, and for the further purpose of aiding and perfecting the description of lands, if any there be, outside of the actual boundaries of said northwest quarter of the northwest quarter of section 9 that plaintiffs claim title to by prescription."

As to the defendants, the allegation of the complaint is as follows:

"That said Chris. Winters and [Jane Doe] Winters, his wife, are now the record owners of lands that lie to the south and the east of said northwest quarter of the northwest quarter of said section 9, and that said Chris. Winters and his said wife claim an interest or estate in plaintiffs' said lands, the precise nature and extent of which to plaintiffs is unknown."

The prayer is for "a decree determining and adjudicating that all of said lands as claimed by plaintiffs are owned in fee by them, subject to dower estate in the plaintiff Anni Rasmussen, and that they are entitled to the possession thereof, for restraining order commanding and prohibiting defendants from interfering with such ownership and possession, and for

such other relief as to the court may seem just and meet, together with their costs and disbursements herein.”

The answer denies all the allegations of the amended complaint except such as are expressly admitted. Affirmatively the defendants state, in substance, that at the commencement of the suit, and for several years before that, they were the owners in fee simple and in possession of the southwest quarter of the northwest quarter and the northeast quarter of the northwest quarter of said section 9, which lands lie south and east of the northwest quarter of the northwest quarter of said section, and that they have never claimed or asserted any right, title or interest in or to the last-named subdivision.

The reply denies the allegations of the answer, except as otherwise stated in the complaint. After a hearing the Circuit Court dismissed the suit, and the plaintiffs appeal. Pending this the plaintiffs substituted new counsel.

Submitted on brief under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

'AFFIRMED.

For appellants there was a brief over the name of *Messrs. Norblad & Hesse*.

For respondents there was a brief prepared by *Messrs. Anderson & Erickson*.

MR. JUSTICE BURNETT delivered the opinion of the court.

The position of the plaintiffs in this court is that, although the suit was tried as one to quiet title, yet the complaint did not state enough to give the Circuit Court jurisdiction thus to determine the issue, and that

now they are entitled to urge on appeal that it is really a proceeding to determine a disputed boundary; while the defendants contend that the complaint is sufficient as for a suit to quiet title, and that, having been tried as such by the plaintiffs, they cannot now change front or mend their hold, but must be bound by the same theory in this court.

1. As said in *Talbot v. Cook*, 57 Or. 535 (112 Pac. 709), quoting from 1 Am. & Eng. Enc. Law (2 ed.), 795:

“There are five essential elements necessary to constitute an effective adverse possession: First, the possession must be hostile and under a claim of right; second, it must be actual; third, it must be open and notorious; fourth, it must be exclusive; and, fifth, it must be continuous. If any of these constituents is wanting, the possession will not affect a bar of the legal title.”

See, also, *Jasperson v. Scharinkow*, 150 Fed. 571 (80 C. C. A. 373, 15 L. R. A. (N. S.) 1178, and notes); *McNear v. Guistin*, 50 Or. 377 (92 Pac. 1075).

We apply this canon to the first-quoted excerpt from the amended complaint. We find the plaintiffs state that they have had possession of all the lands indicated by the Bennett survey under “color of right” and by “hostile adverse possession.” This satisfies the first element of the rule. They also say they have been in “actual occupancy of all of the lands.” This meets the second requirement. They assert that they have held the land “by open, plain and notorious adverse possession” covering the third ingredient, and “against the entire world” which amounts to the exclusive possession under the fourth head, and that they have been in “continuous possession” complying with the last condition of the test. The prayer already noted indicates that it is a suit to quiet title; and, lastly,

at the close of the direct examination of Harold Rasmussen, the first witness on behalf of the plaintiffs, their counsel said to the court:

“I want to freely admit these questions of mine were intended to be merely incidental. I certainly do not want to prove a boundary line. This is not a boundary line case in any way or purpose.”

The allegations of the bill plainly show that, in part at least, the plaintiffs are claiming title by prescription not only to the realty actually included in the government survey of the legal subdivision they mention, but also to outside lands which were in their occupancy. The only grievance they state against the defendants is that the latter claim some interest in the holdings of the plaintiffs which they sought to have declared.

2. We hold, therefore, that not only was there sufficient in the complaint to constitute an assertion of title by prescription, but also that the case was tried on that theory. This being true, the plaintiffs cannot now make a different attack and try the case in this court on some other basis: *Wyatt v. Henderson*, 31 Or. 48 (48 Pac. 790); *Anderson v. Portland Flouring Mills Co.*, 37 Or. 483 (60 Pac. 839, 82 Am. St. Rep. 771, 50 L. R. A. 235); *Mattis v. Hosmer*, 37 Or. 523 (62 Pac. 17, 632); *Larch Mountain Investment Co. v. Garbade*, 41 Or. 123 (68 Pac. 6); *State v. Davis*, 42 Or. 34 (71 Pac. 68, 72 Pac. 317); *Durning v. Walz*, 42 Or. 109 (71 Pac. 662); *Ward v. Queen City Fire Ins. Co.*, 69 Or. 347 (138 Pac. 1067).

3. Moreover, if we should consider this as a case to establish a disputed boundary, the testimony of the plaintiffs is not sufficient to establish the line as they claim it should be, for, as the surveyor noted on the map attached to the complaint and likewise offered in evidence:

"The lines shown on this plat do not purport to be established in accordance with the legal subdivisions of quarter-sections."

He stated as a witness, in substance, that in the vicinity of the northwest corner of section 9 there were two stakes some distance apart, one north of the other, and that at the instance of the plaintiff, Harold Rasmussen, he began the survey at the south stake, when there was quite as much evidence of the other being at the true corner. As their contention is based expressly on this survey it is not sufficient to prove the correctness of the line contended for by the plaintiffs.

The decree of the Circuit Court is affirmed.

AFFIRMED.

Argued January 11, reversed and remanded January 30, 1917.

STATE v. NORRIS.

(162 Pac. 859.)

Infants—Offenses Against Soliciting—"Procure"—"Solicit"—"Entice."

1. Within Section 2078, L. O. L., defining the crime of soliciting, procuring, or enticing a child under 18 years to have sexual intercourse, the words "procure," "solicit," and "entice" each import an initial, active and wrongful effort.

From Crook: T. E. J. DUFFY, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

The defendants were jointly indicted for a violation of Section 2078, L. O. L. The charging part of the indictment is in the following language:

"That E. Rea Norris, J. H. Connarn, John Collins, and Ethel Howell on the ninth day of July, 1915, in the county of Crook and State of Oregon, then and there being, and then and there acting together, did then and there, and while so acting together, wrongfully, unlaw-

fully, and feloniously solicit, entice, procure and attempt to procure a child, to wit, Elda Bell, said child being then and there a female under the age of 18 years, to carnally know and to have sexual intercourse with one E. Rea Norris, the said E. Rea Norris then and there being a male person over the age of 16 years, and the said J. H. Connarn, John Collins, and Ethel Howell and each of them then and there being over the age of 16 years."

The defendant Connarn demanded a separate trial, and is not interested in this appeal. A trial being had as to the other three, there was a judgment of conviction, from which the defendants Collins and Howell appeal.

REVERSED AND REMANDED.

For appellants there was a brief over the names of *Mr. Vernon A. Forbes*, *Mr. Jay H. Upton* and *Mr. Harvey H. De Armond*, with an oral argument by *Mr. Forbes*.

For the State there was a brief over the names of *Mr. George M. Brown*, Attorney General, *Mr. Willard H. Wirtz*, District Attorney, *Mr. W. P. Myers* and *Mr. B. F. Nichols*, with an oral argument by *Mr. Brown*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. There is but one question which we deem it necessary to consider, and that is: Did the trial court err in denying defendants' motion for a directed verdict? The transcript of the testimony is a long and nasty narrative, which need not be perpetuated by a recital here. It is sufficient to say that the defendant Collins was a public automobile driver operating from a garage in the town of Bend. Norris was a physician living in the same town, who employed Collins to take him to

The Dalles. He also invited the defendant Howell to accompany them on the trip. As they passed through the village of Laidlaw, Norris directed Collins to drive to the home of Elda Bell, the prosecuting witness, who owed him money for professional services. Upon reaching her home she paid the doctor some money and inquired as to his destination, which he finally told her was The Dalles. It was then agreed that she accompany them, which she did. She was then the mother of a living child, and ten days before the events upon which the indictment is based was the victim of a self-inflicted abortion whereby she was delivered of a four months' foetus. She had been married in the preceding month to a man who was her cousin, thereby rendering the marriage void under the statutes. There is no doubt but that the entire party drank a quantity of intoxicating liquor and were drunk during at least a portion of the trip; but there is absolutely no evidence tending to show that either Collins or Mrs. Howell ever suggested even by innuendo that Elda Bell should have sexual intercourse with Norris or anyone else.

The words "procure," "solicit" and "entice" as used in pleadings have well-defined meanings, and they each import an initial, active and wrongful effort: 3 Words and Phrases, 2410; 6 Words and Phrases, 5653; 7 Words and Phrases, 6548; *Nash v. Douglass*, 12 Abb. Pr., N. S. (N. Y.), 187.

It follows that the motion for a directed verdict should have been granted.

The judgment is therefore reversed, and the cause remanded for such further proceedings as may not be inconsistent herewith. REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE BURNETT CONCUR.

Submitted on brief December 18, 1916; writ disallowed January 30, 1917.

STATE ex REL. v. MEHAFFEY.*

(162 Pac. 1068.)

Drains—Drainage District Bonds—Statutes Repealed.

1. Laws of 1915, Chapter 340, not effective when a drainage district adopted its by-law, but effective before its directors ordered an election to determine whether they could issue bonds, and relating to the organization of drainage districts and covering the field formerly covered by Sections 6126-6145, L. O. L., inclusive, as amended by Laws of 1911, Chapters 241, 250, and itself providing for the issuance of bonds and for what had been previously left to be done by the district through by-laws, though not dissolving drainage districts then in existence, was a substitute for and by implication repealed prior legislation, so that the district's bonds were required to be issued thereunder.

Drains—Drainage District—Legislation—Constitutional Provisions.

2. Article XI, Section 2, of the Constitution, relating to the enactment of municipal charters, and Article IV, Section 1a, providing for the initiative and referendum on local, special and municipal laws, did not render drainage districts immune from statutes passed by the legislative assembly, so that the Assembly was empowered to enact Laws of 1915, Chapter 340, relating to the organization of drainage districts and purporting to cover the matters formerly covered by Sections 6126-6145, L. O. L., inclusive, as amended by Laws of 1911, Chapters 241, 250.

[As to effect of partial invalidity of statute relating to drains and sewers in municipalities, see note in *Ann. Cas.* 1916D, 76.]

Original proceeding in Supreme Court.

In Banc. Statement by MR. JUSTICE HARRIS.

This is an original proceeding by the State of Oregon, on the relation of M. Motschenbacher and C. R. De Lap, directors of the Klamath Drainage District in which an alternative writ of *mandamus* was issued out of this court directing A. A. Mehaffey to sign or to show cause for not signing certain bonds as secretary of the Klamath Drainage District. The defend-

*On procedure for establishment of drains and sewers, see comprehensive note in 60 L. R. A. 161. REPORTER.

ant answered by claiming that the bonds were not legally authorized. The Klamath Drainage District was organized on March 6, 1915, pursuant to Sections 6126 to 6145, L. O. L., inclusive, as amended by Chapters 241 and 250, Laws of 1911. The residents of the district held meetings on May 1 and 3, 1915, and adopted by-laws for the election of directors, for the acquirement of real and personal property, for the assessment and collection of liens and for the issuance and sale of bonds. These by-laws were approved by the County Court on May 8, 1915. The board of directors adopted a resolution on January 15, 1916, ordering that an election be held for the purpose of authorizing the issuance of bonds to the amount of \$100,000. The election was held on February 19, 1916, and the issuance of the bonds was authorized. On March 7, 1916, the directors passed a resolution declaring their intention to exercise the conferred authority by issuing bonds and on October 3, following, the "Board of Directors of said Klamath Drainage District by resolution, as provided by the by-laws of said district, declared the intention of the said board to sell ten thousand dollars worth of said bonds and ordered the defendant as secretary of the said Klamath Drainage District to prepare notice of such sale and publish same, asking for proposals on said bonds."

The bonds which the directors are permitted to issue mature at different dates varying from "21 years from the date of issue" to "30 years from the date of issue." The secretary places his refusal to sign the bonds on the ground that Chapter 340, Laws of 1915, repealed all prior legislation and that the bonds were illegal because not issued in compliance with the act of 1915. JUDGMENT FOR DEFENDANT.

For plaintiff there was a brief submitted over the names of *Mr. George M. Brown*, Attorney General, and *Mr. Charles J. Ferguson*.

For defendant there was a brief over the name of *Mr. H. C. Merryman*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. Chapter 340, Laws 1915, although passed by the legislative assembly and filed in the office of the Secretary of State, had not become effective when the drainage district adopted its by-laws; but the statute did become effective prior to January 15, 1916, the date on which the directors ordered that an election be held to determine whether the directors could issue bonds. No bonds were issued or even authorized before Chapter 340 became operative. In *State v. Nyssa-Arcadia Drainage District*, 80 Or. 524 (157 Pac. 804), we held that Chapter 340 was a substitute for and therefore by implication repealed prior legislation. A re-examination of the question confirms the conclusion announced in *State v. Nyssa-Arcadia Drainage District*. Chapter 340 has covered the field occupied by prior enactments. The legislative assembly has itself done by positive law all that it had previously left to be done by the district through mere by-laws. By the terms of Chapter 340, Laws 1915, the legislative assembly has itself provided for the issuance of bonds and the Klamath Drainage District must now be guided by the act of 1915. The new statute did not dissolve drainage districts then existing and consequently the corporate life of drainage districts was neither ended nor suspended nor interrupted.

2. The legislative assembly had the power to enact Chapter 340, Laws 1915. Section 2, Article XI, and section 1a of Article IV of the state Constitution do not render drainage districts immune from statutes passed by the legislative assembly. The Klamath Drainage District is governed by the latest statute and consequently bonds must be issued in compliance with Chapter 340, Laws 1915. *State ex rel. v. Port of Astoria*, 79 Or. 1 (154 Pac. 399); *Rose v. Port of Portland*, ante, p. 541 (162 Pac. 498).

The defendant is entitled to a judgment.

JUDGMENT FOR DEFENDANT.

Argued January 23, modified February 6, 1917.

INTERNATIONAL HARVESTER CO. v. BAUER.*

(162 Pac. 856.)

Sales—Conditional Sales—Retaking of Property.

1. Where a conditional sales contract is in the form of a lease with a specified rental and a provision, in event of default in payment, that vendor may resume possession of the chattel and hold the sums already paid as earned rentals, the retaking of the property is a rescission of the contract, relieving the vendee from further obligation.

Sales—Conditional Sales—Retaking of Property.

2. Where a conditional sales contract reserves title in the vendor with a right in case of default to retake the chattel, sell it at public or private sale, and apply the proceeds in payment of the debt, with an express agreement by the vendee to pay the balance of the purchase price then remaining, retaking the property by the vendor does not relieve the vendee from further obligation.

[As to when a person holding property under a conditional sale may transfer a perfect title, see note in 134 Am. St. Rep. 277.]

Chattel Mortgages—Conditional Sales—Costs on Foreclosure.

3. Where vendee in conditional sales contract gave a real estate mortgage as additional security, the vendor was not allowed attor-

*On effect of the retaking of property by seller on the rights and remedies of the parties to a contract of conditional sale, see notes in 32 L. R. A. 455; L. R. A. 1916A, 915.

ney's fee on foreclosure of chattel mortgage evidencing vendor's lien, in addition to attorney's fee for foreclosure of real estate mortgage; both foreclosures being for the enforcement of the same obligation.

From Yamhill: HARRY H. BELT, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

This is an action by the International Harvester Company of America, a corporation, against Jean Bauer, Jacob A. Large and Hattie M. Large, his wife, and L. M. Scroggin. The facts are as follows:

On August 5, 1914, the defendant Jean Bauer purchased from the plaintiff corporation a threshing-machine and engine, giving in payment therefor three promissory notes, one being for \$200, and the other two for \$350 each, the notes all being in the same form and containing the following paragraphs:

"This note is given for one gasoline engine, and one thresher, with bagger and stacker. I agree that the title thereto, and to all repairs and extra parts furnished, shall remain in said company, its successors and assigns, until this and all other notes given for the purchase price shall have been paid in money. If I fail to pay this note when due, or if said property is misused or seized for my debts, the holder of this note may seize and sell the same at public or private sale, with or without notice, pay all expenses thereby incurred, and apply the net proceeds upon this note and other notes given for the purchase price thereof, whether due or not due, and retain all payments before made as rent for the use of said property. I expressly agree to pay any balance on this note remaining unpaid after such property is sold, or if the same be burned or otherwise damaged or destroyed after its delivery to me. The indorsers, sureties, and guarantors severally waive presentment for payment, protest, notice of nonpayment, and diligence."

At the same time the defendant executed a chattel mortgage upon the same property, containing a cove-

nant of ownership, to secure the payment of notes, and contemporaneously therewith he executed a mortgage upon 60 acres of land in Yamhill County as additional security for the payment thereof. These notes matured on the first days of November, 1914, 1915, 1916, respectively. On April 20, 1915, no payment having been made upon the note which matured on November 1, 1914, plaintiff through its attorneys directed the sheriff of Yamhill County to seize the personal property described in the chattel mortgage and to sell the same in accordance with the terms thereof, which was done, and thereafter the sheriff filed his return, from which it appears that he posted notices of such sale in three public places in Yamhill County and published such notices for more than ten days prior to said sale in the "Willamina Times" and the "Sheridan Sun," and on Monday, the third day of May, 1915, sold the property at public auction to the highest and best bidder for cash; that the price received therefor was \$200; that the expenses, costs and sheriff's commission amounted to \$16.70; that \$100 was paid as attorney's fees in connection with said sale; and that there was a credit made upon the notes of \$84.30. On April 20, 1915, the plaintiff began this suit to foreclose the mortgage upon the real estate.

The second amended complaint upon which the case was tried recites the facts as herein stated, and prays for a decree in accordance therewith. To this complaint the defendant answered, taking issue, so far as the matter is of interest upon this appeal, upon the question as to whether or not the sale was an absolute one or conditional. A trial being had, there was a judgment and decree for plaintiff for the full sum of \$900, with interest, \$100 as reasonable attorney fees,

and for costs and disbursements, from which judgment and decree defendant appeals. MODIFIED.

For appellants there was a brief over the names of *Mr. W. O. Sims* and *Mr. Joseph Mannix*, with an oral argument by *Mr. Sims*.

For respondent there was a brief over the names of *Messrs. Holmes & Pearce* and *Mr. E. S. Snelling*, with an oral argument by *Mr. Frank Holmes*.

MR. JUSTICE BENSON delivered the opinion of the court.

There is no substantial conflict in the evidence. On August 5, 1914, the notes, chattel mortgage and real estate mortgage were executed. The first note was due November 1, 1914, and no part thereof was paid. On April 20, 1915, the defendant still being in default, plaintiff directed the sheriff to seize the personal property and sell it in accordance with the terms of the chattel mortgage, and at the same time began this suit to collect the purchase price and to foreclose the real estate mortgage.

Defendant urges with much force the contention that the contract as set out in the promissory notes and the chattel mortgage constitutes but one agreement which is purely a conditional sale; that the seizure by the sheriff was nothing more than a retaking of the machinery under the vendor's reservation of title, and that such action is in effect a rescission of the contract which leaves the real estate mortgage without consideration. It seems perfectly clear to the writer that the facts disclose a clear and unequivocal election upon the part of plaintiff to treat the transaction as a completed, absolute sale, and to proceed

to the collection of the purchase price, as he has an undoubted right to do: *Herring-Marvin Co. v. Smith*, 43 Or. 321 (72 Pac. 704, 73 Pac. 340); *McDaniel v. Chiaramonte*, 61 Or. 403, 408 (122 Pac. 33). If we concede for the purposes of this discussion that the seizure of the machinery under the terms of the chattel mortgage is equivalent to taking possession under the terms of the notes, defendant's deductions therefrom do not necessarily follow.

1. There is considerable variety in the form and character of conditional sales contracts. In some instances the agreement is in the form of a lease with a specified rental and a provision, in the event of a default in payment, that the vendor may resume possession of the chattel and hold the sums already paid as earned rentals. The courts have properly held in such instances that the retaking of the property is a rescission of the contract, operating to relieve the vendee from any further obligation. The following cases are illustrations of this species of agreement: *Manson v. Dayton*, 153 Fed. 258 (82 C. C. A. 588); *Parke & L. Co. v. White River Lumber Co.*, 101 Cal. 37 (35 Pac. 442).

There is another group wherein the vendor reserves title within himself, with an express power to retake the chattel upon default and sell it, applying the proceeds of such sale upon the purchase price, but without any stipulation for a continuing liability upon the part of the vendee. As to the effect of this class of contracts the authorities are in conflict. In Kansas and Michigan the courts have held that the vendor is entitled to take and sell the chattel, apply the proceeds of such sale to the purchase price, and then proceed by action to enforce the collection of the unpaid balance thereof: *Christie v. Scott*, 77 Kan. 257 (94 Pac.

214); *Van Den Bosch v. Bouwman*, 138 Mich. 624 (101 N. W. 832, 110 Am. St. Rep. 336). The Supreme Court of Minnesota, however, has held that in such cases the vendor cannot recover the remainder of the purchase price, basing its conclusion upon the theory that the promise of payment and the implied obligation to transfer the title are mutual, and as each is the sole consideration for the other, and both are to be performed at the same time, they are concurrent conditions of the same agreement in the nature of mutual conditions precedent, so that inability or refusal to perform one would excuse the performance as to the other: *Third Nat. Bank v. Armstrong*, 25 Minn. 530; *Minneapolis Harvester Works v. Hally*, 27 Minn. 495 (8 N. W. 597).

2. We then have the type of contract of which the one under present consideration is a striking example. There is a reservation of title in the vendor, the right in a case of default to retake the chattel, sell it at public or private sale, and apply the proceeds in payment of the debt, and an express agreement upon the part of the vendee to pay the balance of the purchase price. Minnesota and Arkansas have held that a sale of the chattel in such cases and applying the proceeds to the purchase price effect a cancellation of the remainder of the debt: *Keystone Mfg. Co. v. Cassellius*, 74 Minn. 115 (76 N. W. 1028); *Nashville Lumber Co. v. Robinson*, 91 Ark. 319 (121 S. W. 350). We think the great weight of authority and the better reasoning support the contrary doctrine that, if the vendee sees fit to enter into a contract of this sort, it is the duty of the courts, when called upon, to enforce it as it is written. The appellate courts of Canada have uniformly sustained this view: *Gaar-Scott Co. v. Mitchell*, 1 D. L. R. 283; *Abell Mfg. Co. v. McGuire*, 13 Manitoba L. Rep.

454; *Hopkins v. Danroth*, 1 Sask. L. R. 225; *Peebles v. Johnson*, 1 Sask. L. R. 523. In Oklahoma, New York and Texas the same view is adopted: *McCormick Harvesting Machine Co. v. Koch*, 8 Okl. 374 (58 Pac. 626); *Warner v. Zuechel*, 19 App. Div. 494 (46 N. Y. Supp. 569); *Ascue v. Aultman & Co.*, 2 Willson Civ. Cas. Ct. App. 444. As is very aptly said in *White v. Solomon*, 164 Mass. 516 (42 N. E. 104, 30 L. R. A. 537), cited by defendant:

"We are not to construe equities into the contract, but to carry it out as the parties were content to make it. If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby binding himself to pay the whole sum."

However we may deplore the folly of the defendant in entering into such a contract or the unbounded avarice of a plaintiff who would enforce it to such an extent, we cannot see our way clear to relieve the defendant from the burden of his deliberately assumed obligation.

3. There are nevertheless some slight errors in the decree of the lower court which must be corrected. The plaintiff cannot have two attorney fees allowed for the enforcement of the same obligation, and since the court has properly allowed an attorney fee of \$100 for prosecuting this suit, the \$100 which were withheld upon the sale under the chattel mortgage should be credited upon the note, making a total credit of \$184.30 thereon. With this and the further modification that neither party recover costs in the lower court, and that the defendant recover his costs in this court, the decree is affirmed. MODIFIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE
and MR. JUSTICE BURNETT concur.

Argued January 17, reversed February 6, 1917.

COOS v. COOS.*

(162 Pac. 860.)

Divorce—Cruel and Inhuman Treatment—Evidence—Sufficiency.

1. Evidence held to show such cruel and inhuman treatment by abusive cursing, ill temper and lack of support as to warrant decree of divorce for the wife.

[As to cruelty as ground for divorce, see notes in 29 Am. Dec. 674; 73 Am. Dec. 619; 40 Am. Rep. 463; 51 Am. Rep. 736; 65 Am. St. Rep. 69.]

From Yamhill: HARRY H. BELT, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This is a suit by Carrie Coos against J. A. Coos for a divorce on the ground of cruel and inhuman treatment and personal indignities rendering her life burdensome, and for the custody of their daughter, Margaret, who was four years old when the suit was commenced. The cause, being at issue, was tried, and the suit dismissed, from which decree the plaintiff appeals.

REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. B. A. Kliks*.

For respondent there was a brief over the name of *Messrs. McCain, Vinton & Burdett*, with an oral argument by *Mr. James E. Burdett*.

MR. JUSTICE MOORE delivered the opinion of the court.

It appears from the testimony given at the trial that the parties were married March 4, 1909. Prior there-

*On profanity and obscenity as grounds for divorce, as cruel and inhuman treatment, see note in 12 L. R. A. (N. S.) 820. REPORTER.

to the plaintiff had been engaged in a department store, fitting ladies' ready-made gowns and coats. The defendant then was a logger, and for some time thereafter he continued in that business, his wife residing with him at lumber camps. She testified that about three months after her marriage the defendant began growing cross and disagreeable toward her, which conduct continued until March 29, 1915, when she was obliged to leave him, taking the child with her to the home of a relative. The first year of their marriage the company employing the defendant failed in business, and he lost thereby about one half of the wages which he had earned. Owing to the sluggish condition of the lumber market on the Pacific Coast in subsequent years the former activity in the timber business was retarded, and the defendant was obliged to seek employment in other fields of labor in which he took but little interest, and in consequence thereof he worked but a short time at any one place. As the support of himself and family was derived from his wages, his failure continuously to pursue any occupation necessarily reduced those depending upon him almost to a state of penury. The plaintiff testified that in the six years during which she lived with her husband he purchased for her articles of wearing apparel the prices of which did not exceed \$52, and that the clothing which she possessed at the time of her marriage was, after many turnings of the material, so much worn that she became destitute, whereupon her sister gave her \$25, which sum of money she used in replenishing her wardrobe. In answer to the inquiry as to what statements the defendant made to the plaintiff in reference to her leaving him she testified:

"He told me a number of times, when he would be acting bad, that if he didn't suit me, I could get up and

go; that he would be a damned sight better off without me.

"Q. Was this on the one occasion of your going to leave, or before that?

"A. Before that, a number of times. He once got mad because I owed a little interest, paid some money on a piece of land my brother owned. He wanted me to have my brother make a deed to the place. I objected. He got mad and cross, and cursed around and said lots of things. For three days he wouldn't come in to eat. Occasionally he would come in between meals and go to the cupboard and get something to eat. I have come in and asked him if he found anything. He would say: 'What in hell does it make any difference to you? You don't care a damn bit about me. Go pet your brother.'

"Q. How long would he go that way, without speaking to you?

"A. A week or so. He wouldn't speak unless I asked him something. Then he would curse, or else not answer when I spoke to him. It was a common thing, a frequent occurrence, and sometimes it would be more than a week, as long as three. We lived in one place, it was an old shed, and the door had nothing but a block nailed there for a latch, and he would come and kick on the door, and not ask me to open the door, and if I didn't get there in time he would kick until he knocked the door loose. That is the way he let himself in, lots of times.

"Q. What could you say as to him scolding you during the last three or four years, how he spoke to you, if at all?

"A. Well, he would get cross and scold, and lots of times go on about something I had done, saying why in hell I didn't have sense enough to do it some other way, and looked like I ought to know enough. Maybe leave me with the chores to do, and I would do them the best I could, and after he came home, I hadn't done them to suit him, and he would say why in hell didn't I know enough to do them some other way, and it looked like I would have sense enough to know a few things. * * He would come in to his meals. I

always tried to have them on time; sometimes he would put the clock back a few minutes, and I wouldn't know it, and dinner wouldn't be quite ready, then it would be, 'Damn it, what in hell have you been doing?'"

The plaintiff testified that, though she desired the defendant should not incur any indebtedness, he negotiated for prunes growing in an orchard, agreeing to pay for the fruit when it was harvested, and that he gathered and sold the crop, but did not pay for it. She further stated upon oath that her husband sold a pair of horses that were mortgaged, and was arrested for the offense; that the defendant frequently drank intoxicating liquor, and on one occasion he became so much under the influence of the alcoholic beverage that he vomited on the floor of their dwelling. Mr. Coos habitually used profane and indecent language in the presence and hearing of his wife and daughter until the latter commenced repeating her father's irreverent expressions. The mother testified on this subject that when the little girl would get in his path he would say to her: "God damn you, get to hell out of my way"; that he would use in their hearing utterances that are set forth in the transcript, but which are too obscene to be repeated in an opinion; that he would tell Margaret he didn't want her to obey her mother, saying to the latter: "You haven't got as much sense as the child." In answer to the court's inquiry on direct examination as to what the defendant had called her, the plaintiff testified:

"He never applied a curse directly to me until I told him I was going to leave, and then he said, 'God damn it to hell,' if I wanted to go, he wouldn't stop me. He said I was nothing but a 'damn low son-of-a-b——h.' He repeated that several times."

She further testified on this subject:

"He never applied his curses direct to me only the one time more than to say, 'Get your damned head out of the way,' or 'your damned arm out of the way.'"

Another question by the court was:

"Do you think it would be impossible for you and your husband to adjust your differences?"

She replied:

"It certainly would. I tried six years to get along the best I could. It was simply impossible. I stayed on account of the child; I thought, perhaps, he would get better on her account, but he didn't. I simply saw that if I expected anything from her I had to get away; if it had not been for the bad effect on the baby—no matter for myself—if it hadn't been it would have ruined the child, I would have stayed."

In referring to the defendant Mrs. Coos further testified:

"I remember once, he sat around the house most of the day—it was in the winter, I remember. He sat around the house most all day. He wasn't working. There was nothing but a few chips around the barn. He didn't come back from the barn after dinner. There was very little wood for the heater, and nothing at all for the cookstove. The next morning, of course, there was no wood. He wanted to know if there wasn't any, and I said, 'No,' he didn't get any before he went to bed. He wanted to know, 'why in hell I didn't get out and pick up some chips.' There was absolutely nothing to burn. I had to ask him to cut up some of the sticks to burn in the heater. I got out after a while—he sat by the fire—and I went out in the field below the house and hunted up some old water-soaked boards, and found some with pitch in them and managed to get a fire and get breakfast."

On cross-examination the plaintiff was asked:

"Isn't it a fact, Mrs. Coos, that your whole difficulty and trouble lay in the fact that he didn't provide you

with clothes and wearing apparel such as you thought you deserved?"

She answered:

"No, it wasn't that.

"Q. That had nothing to do with it?

"A. I could have put up with the poverty, if things had been all right otherwise. I didn't like his treatment of me and the child.

"Q. Treatment—what do you mean by treatment?

"A. He was always cross and ugly. I couldn't do anything to please him. When he would come into the house, just the least little thing would cause him to fly to pieces, and curse and be angry. That is the way it went all the time."

The plaintiff's sworn declarations as to the defendant's habitual profanity and his frequent use of indecent language in the presence and hearing of her and their child is corroborated by the testimony of Mrs. Coos' sister and brother.

The defendant testified:

"I never in my life misused my wife that I am sure of. As far as swearing at her for instance, I never cursed my wife no place, no where, no time, never did.

"Q. Did you, your baby?

"A. Never did. In a way I did this: I have told my baby when she would be in the way—she was always with me if I was around the house any place, around where she could be—'Damn it, get out of the way; what are you doing here?' That was frequent with me, but the kid never paid no attention to it."

Denying the use of obscene language so attributed to him by the plaintiff, her brother and sister, the defendant testified:

"If that was ever done it was unbeknown to me. I swear very often, and I did swear at the home or any place else, as a rule. It is a habit, and used very frequent, but as far as using language that I have been accused of using and as frequent as they say, well I

probably have used the language they say when I would be out away from the house, but if I used it in the presence of my baby or anybody else, I never knew it. I have used that language, the chances are, when I would be outside.

"Q. Away from home?

"A. Yes; but as far as using that kind of language in the house, or close to the house, I deny it. I never did it."

The court inquired:

"Did you ever hear the little girl use bad language?"

The defendant replied:

"I heard my little girl one time try to swear. That was just at the time she first begun to talk, you know. She tried to say, 'Damn it.' I told my wife, and she shamed me—told me I ought to be ashamed, and said, 'You ought to quit that.' We laughed about it at the time, it was kind of funny to hear the kid try to say that—she couldn't say it, you know. She [the plaintiff] scolded her [the child] for it. That stopped that part of it all right enough. I never heard her [the daughter] try to use it more than a couple of times."

In answer to the court's question: "Did you ever use the words, 'son-of-a-b——h' in the presence of your daughter or wife?" the defendant replied: "Well, I expect probably I did. I never called either of them that, but I used the word a number of times."

Mr. Coos further testified that after his marriage he never gambled but once; that when he vomited on the floor he had been ill, and, having taken a bottle of ginger ale, the liquid nauseated him, and that since his marriage he had not spent for alcoholic beverage more than \$5.

The foregoing is deemed to be a fair presentation of the material testimony relating to the cause of suit relied upon by the plaintiff as entitling her to a di-

vorice. A perusal of the evidence hereinbefore detailed will show that the defendant never assaulted the plaintiff or threatened her with any violence. His habitual use, however, of profane and obscene language evidently so shocked the plaintiff's moral sense and wounded her feelings to that extent that she believed if her daughter was to be raised to virtuous womanhood, it was necessary to take the child from her father's contaminating influence. It does not appear that the plaintiff was a member of any church or that she had been reared in the home of religious people. No testimony was offered tending to show that the plaintiff ever used profane language. The hope cherished for the future welfare of the daughter, and the fear entertained by the evil consequences upon her of the defendant's loathsome language, must have caused the plaintiff grievous mental suffering, rendering her life burdensome. A text-writer in discussing this subject remarks:

"The habit of a husband of cursing and swearing at his wife and using vile and indecent language, especially in the presence of the children or third persons, is a material consideration, together with the other circumstances of the case, to show cruelty": 9 R. C. L. 344.

See, also, 14 Cyc. 608; *Mosher v. Mosher*, 16 N. D. 269 (113 N. W. 99, 125 Am. St. Rep. 654, 12 L. R. A. (N. S.) 820). Carefully considering all the circumstances adverted to, it is believed the charge of cruel and inhuman treatment as alleged in the complaint has been fully substantiated.

The decree will therefore be reversed, and one entered here granting the plaintiff a divorce and awarding to her the care, custody and control of the minor child, Margaret Coos. The cause will be remanded,

however, to the lower court to take further testimony, if necessary, and to make an order requiring the defendant to contribute at stated intervals such reasonable sum as may be determined upon for alimony and the support of his daughter.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and
MR. JUSTICE MCCAMANT CONCUR.

Argued January 17, affirmed February 6, 1917.

TAYLOR v. FARMERS' IRR. CO.

(162 Pac. 973.)

Waters and Watercourses—Seepage—Injunction—Burden of Proof.

1. One suing to restrain the maintenance of a water corporation's ditch across his land, because seepage therefrom was injuring the land, has the burden of proving that the water which injured the land had escaped from defendant's ditch.

Waters and Watercourses—Seepage—Injunction—Evidence.

2. In a suit to enjoin the maintenance of a water corporation's ditch across plaintiff's land, evidence as to the construction and maintenance of the ditch, and of seepage therefrom as the cause of the injury, *held* not to entitle plaintiff to the extraordinary remedy of injunction.

[As to liability of municipality for negligence in construction or operation of waterworks, see note in Ann. Cas. 1912A, 220.]

From Hood River: WILLIAM L. BRADSHAW, Judge.

This is a suit for injunction by Fred H. Taylor against the Farmers' Irrigation Company, a corporation, in which a decree was rendered in favor of defendant, and plaintiff appeals. The facts are set forth in the opinion of the court.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. John Baker*.

For respondent there was a brief and an oral argument by *Mr. George R. Wilbur*.

Department 2. MR. JUSTICE BEAN delivered the opinion of the court.

This is a suit to enjoin the defendant from allowing its waters to run upon plaintiff's lands. The Circuit Court denied the relief prayed for, and plaintiff appeals.

The defendant is a private corporation, organized in this state under the act of 1891 for the purpose of supplying water for general rental, sale or distribution, for domestic consumption, watering livestock and irrigation. It is engaged in taking water from Hood River and distributing it to lands along the west side of Hood River valley. Its right of way traverses along and inside the boundary of plaintiff's premises. The complaint charges that by reason of the defective construction of its ditch or canal, and by reason of its failure and negligence in keeping the ditch in good repair, the defendant company trespassed upon the lands of the plaintiff during the irrigating seasons of 1913 and 1914, by negligently and purposely allowing the waters of its ditch to seep, leak and escape through the bottom and side walls thereof and run down upon plaintiffs's lands, to his great and irreparable damage, and that the defendant refuses to desist, but persistently continues to flood such lands.

Defendant denies that it has been negligent, or that any water from its ditch or canal has escaped by leakage or seepage, or percolated upon plaintiff's lands, and contends that the same are naturally low, wet and swampy; that the waters found therein are the result of natural seepage and conditions; that its ditch was properly and skillfully constructed, and has been so

maintained. The company denies that it has caused plaintiff any injury, and asserts that in any event his remedy, if any, is not by injunction, but at law. The trial court found that defendant's ditch or canal was properly constructed, and had been kept in good repair, and that the water flowing therein did not seep or escape upon plaintiff's premises. Upon the trial the plaintiff introduced some testimony that seepage water was upon his lands, and appears to rely upon an inference that it escaped from defendant's canal. The proper and skillful construction and subsequent maintenance of the company's works shown by the evidence on its behalf is not disputed by the plaintiff, who evidently assumes that the defendant is liable if any water escapes from its ditch on to his lands, even if no injury is caused thereby.

1. The evidence shows that the lands of the plaintiff were to some extent wet prior to the construction of the defendant's ditch, and that there were three low places or draws thereon, so that it was possible for water to drain from the higher surrounding beach land on to that portion of plaintiff's land where the dispute arose. From the evidence it may be possible that there was a slight increase of the water upon his land, but to what extent it was increased is not shown. Neither is it shown that the lands in question are of any less value than they were prior to the alleged injury, nor that plaintiff's crops have been damaged to any appreciable extent by the seepage water, whatever its source. On the other hand it appears that plaintiff during the time raised good crops on the tillable portion of the land claimed to be too wet. The burden is upon plaintiff in such case to show that he has been injured: 3 Kinney, Irr., p. 3126, note.

2. Evidence was introduced on the part of the defendant fairly showing that its ditch was constructed according to the best known methods in order to prevent seepage or leakage, and that it has done all that it can do to keep the same in the best possible condition to prevent leakage. At times, especially when the water was first turned into the ditch in the spring, there was some leakage on account of gopher or mole holes through the banks.

There is no controversy in regard to the right of way for the defendant's canal. It must be assumed, therefore, that it has lawfully constructed its ditch over the lands of the plaintiff. The evidence shows that the defendant has been diligent in its effort to keep its ditch in repair, and to ascertain any leaks caused by gophers or otherwise, and to remedy the same. Plaintiff's evidence does not show that defendant has been guilty of negligence which has resulted in any actual damage to him. The statute under which the irrigation ditch was incorporated provides:

"Every corporation constructing a ditch or canal, flume, or reservoir, under the provisions of this act shall be liable for all damages done to the persons or property of others, arising from leakage or overflow of water therefrom growing out of want of strength in the banks or walls, or negligence or want of care in the management of said ditch or canal, flume or reservoir. * * *": Section 6540, L. O. L.

Without using the exact language of the statute, a rule in conformity therewith was applied by this court in *Mallett v. Taylor*, 78 Or. 208, 213 (152 Pac. 873, 875), which was a case to restrain the defendant from negligently permitting water used by him in irrigating his land to escape by overflow and percolation on to the adjoining lands of plaintiff. Mr. Justice MOBRIDE, speaking for this court, there said:

"In the case at bar we are satisfied that the defendant has conducted his irrigating operations so carelessly and with such disregard of the rights of plaintiff that the court was right in enjoining their further continuance in that manner. That cases must often arise where by accident, such as sudden floods, or unusual rains or other accidents, damage may occur to adjoining fields which could not reasonably have been foreseen, and for which no action will lie, seems to be established by the later authorities "

It has been held that the owner of a ditch is not liable *per se* for leakage from his ditch, without negligence upon his part, by the burrowing of gophers or other animals: 3 Kinney, Irr., p. 3126, note; *Tenney v. Miners' Ditch Co.*, 7 Cal. 335. However, if the ditch owner is negligent, and injuries occur from this cause, he is liable: *Greeley Irr. Co. v. House*, 14 Colo. 549 (24 Pac. 329). The theory of plaintiff's case, as declared by his complaint, is that the defendant was negligent in the respects alleged. He has failed to prove such negligence, and has also failed to show fairly that any injury was caused to his lands or crops by water seeping or leaking from the defendant's ditch. We concur in the finding of the trial court that the plaintiff has not proved a case sufficient to warrant the exercise of the extraordinary remedy by injunction: See 3 Kinney, Irr., § 1672, p. 3079; *Emison v. Owyhee Ditch Co.*, 37 Or. 577 (62 Pac. 13); *Howell v. Big Horn etc. Co.*, 14 Wyo. 14 (81 Pac. 785, 1 L. R. A. (N. S.) 596); *Fleming v. Lockwood*, 36 Mont. 384 (92 Pac. 962, 122 Am. St. Rep. 375, 13 Ann. Cas. 263, 14 L. R. A. (N. S.) 1628); *Middelkamp v. Bessemer Irr. Co.*, 46 Colo. 102 (103 Pac. 280, 23 L. R. A. (N. S.) 795); *Garnet Ditch Co. v. Sampson*, 48 Colo. 285 (110 Pac. 79, 1136).

The decree of the lower court will therefore be affirmed. AFFIRMED.

MR. CHIEF JUSTICE McBRIDE, MR. JUSTICE MOORE and
MR. JUSTICE McCAMANT CONCUR.

Argued January 19, affirmed February 6, 1917.

JONES v. ROSS.*

(162 Pac. 974.)

Executors and Administrators—Sale of Realty—Procedure—Directions for Sale.

1. Under Section 1263, L. O. L., providing that, when a testator shall provide in his will for the sale of his estate, it may be sold as directed by the executor without an order of the court, an executrix given by the will a power of sale, accompanied by a command to execute it, can sell the realty without taking the preliminary steps required by Sections 1248, 1253-1255, L. O. L., or obtaining the order for sale required by Section 1256.

Executors and Administrators—Sale of Realty—Direction for Sale—Publication of Notice.

2. Where a will gave an executrix a naked power to sell the real estate and commanded her to exercise that power, but gave no directions as to the manner and terms of sale, the executrix could not, under Section 1263, L. O. L., providing that, when a testator makes provision in his will for the sale of his estate, it may be sold as directed by the executor without an order of the court, but that he shall be bound to conduct the same and make return thereof in all respects as if made by order of the court, unless there are special directions in the will concerning the manner and terms of sale, in which case he shall be governed by such directions, give a binding option to sell without giving the notice of sale required by Section 1257.

Executors and Administrators—Sale of Realty—Power—Trust.

3. The powers of an executrix who was given by the will a naked power to sell real estate differ from those of a testamentary trustee to whom the land was devised with directions to sell to carry out the trust, and who is usually free from the statutory limitations imposed on executors and administrators.

[As to implied power of executor to sell real estate of testator, see note in Ann. Cas. 1916D, 410.]

*On the question of implied power of executor or trustee to sell real property, see comprehensive note in 32 L. R. A. (N. S.) 676.

From Columbia: JAMES A. EAKIN, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

L. A. Jones is attempting to compel the performance of an alleged contract for the sale of land. Frances Ross is the executrix of the estate of John Frederick Dangerfield, deceased. A tract of land known as the Dangerfield farm "is a part of said estate." Dangerfield left a will dated January 26, 1914, in which he provided for the payment of his debts, nominated the executrix and directed:

"That all my property, both personal and real, situate in said county and state, be sold by my executrix as soon as conveniently after my decease, and that out of the proceeds of said sales she shall pay to my sister Helen Weaver, in Hereford, England, one thousand dollars, and to Frances Ross of Scappoose, Oregon, five thousand dollars, and all the rest and residue of my property and the proceeds of said sale I desire to be equally divided between my said sister Helen Weaver and said Frances Ross."

On March 13, 1915, without having given or published any notice of sale, Mrs. Frances Ross gave to L. A. Jones, in consideration of \$20, "the exclusive and sole right and option to purchase from me" the Dangerfield farm for \$6,000, to be paid in cash on May 12, 1915, or by installments, and if Jones elected to pay by installments, he was required to make the first payment of \$1,000 "within 60 days from date." The written option is signed, "Mrs. Frances Ross," and no mention is made of the signer as executrix. On May 12, 1915, Jones tendered \$1,000 to "Frances Ross, executrix of said estate," and offered to carry out the terms of the written option; but "Frances Ross, executrix of the estate of John Dangerfield, deceased, did then and there * * refuse to accept or take said

money, and did then and there refuse to proceed or carry out the terms and provisions" of the option. Mrs. Frances Ross, as an individual, and Frances Ross, as an executrix, are both made defendants, although the complaint alleges that "Mrs. Frances Ross had no right, title or interest in said estate, except as executrix of the will of John Dangerfield, deceased."

The trial court sustained a demurrer to the amended complaint, and then, when the plaintiff refused to plead further, decreed that the suit be dismissed; whereupon the plaintiff appealed.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Charles M. Hodges*.

For respondents there was a brief and an oral argument by *Mr. J. W. Day*.

MR. JUSTICE HARRIS delivered the opinion of the court.

The plaintiff is not attempting to compel Frances Ross to carry out the contract as an individual, but the object of the suit is to enforce the performance of the contract by her as executrix. The complaint proceeds upon the theory that the written option binds Frances Ross as executrix, and that it was her duty as such executrix to report the sale to the county court; for it is expressly alleged that it "was the duty of Frances Ross, as executrix" of the estate, "to receive the \$1,000 as the first payment of the purchase price of said estate and report the sale of said estate to the county court as provided by law." For the purposes of this discussion we shall assume, without deciding, that the written option is the contract of Frances Ross as executrix, and that she is obligated in her repre-

sentative capacity to whatever extent the writing would be enforceable if it had been signed by her as executrix. The defendants contend that the option is a nullity, because the statute was not followed; while the plaintiff argues that the will itself conferred ample power upon the executrix to make the contract.

The Code prescribes the procedure for the sale of real property by executors or administrators. A petition must be filed and notice given to the devisees and heirs (Sections 1248, 1253, 1254 and 1255, L. O. L.); a hearing must be had and an order of sale made (Section 1256, L. O. L.); if the land is sold at public auction, the sale must be made in the same manner as like property is sold on execution, and, if sold at private sale, the executor must publish a prescribed notice (Section 1257, L. O. L.); a return of the sale must be made to the County Court (Section 1258, L. O. L.); and upon the hearing the court confirms the sale or a resale may be ordered (Section 1260, L. O. L.). Before proceeding further, attention is especially directed to Section 1263, L. O. L., which, so far as it is material, reads thus:

“When a testator shall make provision in his will for the sale or disposition of all or any particular portion of his estate, the same may be sold or disposed of as directed, by the executor or administrator with the will annexed, without an order of the court therefor, but he shall be bound to conduct the sale and make a return thereof in all respects as if it were made by order of the court, unless there are special directions in the will concerning the manner and terms of sale, in which case he shall be governed by such directions in such respects. * * ”

1. Turning to the will, we observe that the testator has granted to the executrix a naked power of sale, which is accompanied with a command, however, that

she shall execute the power; but no directions are given concerning the manner or terms of sale. Since the will clothes the executrix with authority to sell the land, it follows that it was not necessary for her to secure an order of the court permitting the sale, for the reason that Section 1263, L. O. L., provides that the power of sale may be exercised without an order of the court: *Brown v. Brown*, 7 Or. 286, 299; *Northrop v. Marquam*, 16 Or. 173, 187 (18 Pac. 449).

2. If a testator supplements the power of sale with directions concerning the manner and terms of sale, then the executor or administrator "shall be governed by such directions in such respects"; but, if the will contains no directions concerning the manner and terms of sale, then every step must be taken which the statute prescribes shall be taken subsequent to the order of sale, for the reason that the executor or administrator is then "bound to conduct the sale and make a return thereof in all respects as if it were made by order of the court." One of the steps marked out by statute is the giving of notice of the sale, and this notice must be given whether the sale is public or private: *Estate of Durham*, 49 Cal. 490, 495; *Perkins v. Gridley*, 50 Cal. 97. The executrix was powerless to make a binding contract without giving notice of the sale, and the writing relied upon by the plaintiff is therefore a nullity.

3. The will did not devise the land to the executrix with directions to sell. The power to sell was not coupled with an interest held by the executrix. While she is, of course, a trustee in a certain sense of the term, even when acting as executrix, yet the will does not make Frances Ross the executrix, and also name her as the technical trustee to carry out a specific trust. The complaint alleges that what Frances Ross

did was done by her as executrix, and the plaintiff is seeking to hold her as executrix. Even if it be conceded that the will provides for the creation of a trust and the appointment of a trustee as distinguished from an executrix, there is nothing in the amended complaint to show that Frances Ross has metamorphosed from an executrix into a trustee by having fully discharged her duties as executrix: *Roach's Estate*, 50 Or. 179, 187 (92 Pac. 118). If the will had devised the land to Frances Ross in trust, with directions to sell, and if the debts of the testator and the expenses of administration had been paid, and if the duties of the executrix had been fully performed, and the duties of testamentary trustee assumed, then there would be room for the contention that she could sell the land without following the steps prescribed for the sale of land by executors or administrators. In the instant case, however, the power conferred upon Frances Ross was granted to her as an executrix, and, therefore, when she acts in that capacity, she is governed by the statutes which prescribe the procedure for the sale of lands by executors and administrators. The distinction between an executor and a testamentary trustee is recognized and the difference between their powers is noted in *Brown v. Brown*, 7 Or. 286, 299. See, also, *Thorsen v. Hooper*, 57 Or. 75 (109 Pac. 388); *Id.*, 50 Or. 497 (93 Pac. 361); *Jasper v. Jasper*, 17 Or. 590, 597 (22 Pac. 152); *Edgar v. Edgar*, 26 Or. 65 (37 Pac. 73).

California has a statute much like Section 1263, L. O. L., and the Supreme Court of that state has in numerous adjudications pointed out the difference between the authority of a testamentary trustee and the power of an executor. Ordinarily the executor acts pursuant to the directions of the Probate Court, and

is guided by the statutes regulating the doings of executors, while a testamentary trustee is usually subject to the directions of the Circuit Court, and is freed from the statutory limitations imposed upon executors and administrators: *Estate of Matthew Delaney*, 49 Cal. 76; *In re Williams*, 92 Cal. 183 (28 Pac. 227, 679); *In re Pearsons*, 98 Cal. 603 (33 Pac. 451); *Bennalack v. Richards*, 116 Cal. 405 (48 Pac. 622); *Estate of Pforr*, 144 Cal. 121 (77 Pac. 825); *Bennalack v. Richards*, 125 Cal. 427 (58 Pac. 65).

If the testator had devised the land to a designated person with directions to sell and execute a specified trust, and if the testamentary trustee had made a contract to sell, quite a different question would be presented. The Dangerfield will confers the naked power to sell upon the executrix, who must exercise the power as executrix, and not as a testamentary trustee, in the administration of the estate pursuant to the statutes governing the sale of land by executors and administrators and subject to the jurisdiction of the Probate Court. The so-called option to purchase is a nullity, and cannot be enforced against the executrix in any court.

The decree is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE McBRIDE, MR. JUSTICE BEAN and MR. JUSTICE BENSON concur.

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ABORTION.

Abortion—Elements.

1. Procuring an unlawful abortion upon any woman always involves an assault in law, even when it is done with her consent and connivance, because no one can consent to an unlawful act. (*State v. Farnam*, 211.)

See Homicide, 1, 2.

ACKNOWLEDGMENT.

See Dedication, 3.

ACTION.

Action—Parties Jointly Liable—Default.

1. Where the complaint alleged a joint liability of all defendants, the court may proceed to trial as to those who have answered and joined issue without first entering default and judgment against others who had been served but did not appear, for the old technicality with respect to joint actions has been relaxed, and, though a joint liability is averred, recovery may be had on proof of a several liability. (*Hewey v. Andrews*, 448.)

See Arbitration and Award, 1.

See Assignments, 1, 2.

See Attorney and Client, 1, 4, 6, 7, 9.

See Bills and Notes, 5-10, 13.

See Carriers, 8.

See Electricity, 2.

See Judgment, 1, 2.

See Pleading, 1.

See Wills, 3.

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See Evidence, 4.

ADVERSE POSSESSION.

Adverse Possession—Requisites—Effect.

1. Continuous adverse possession of land for ten years under a claim of title is sufficient to pass to the possessor the fee-simple estate. (*Parker v. Kelsey*, 334.)

Adverse Possession—Requisites—Parol Gift.

2. A parol gift of land is sufficient to inaugurate adverse possession. (*Parker v. Kelsey*, 334.)

Adverse Possession—Effect—Extent.

3. Where plaintiffs claim by adverse possession inaugurated by a parol gift of land, they may obtain title to the portion actually inclosed only. (*Parker v. Kelsey*, 334.)

Adverse Possession—Color of Title—Deed.

4. The grantee of lands from the state of Oregon which the state had acquired under the swamp-land acts, Act Cong. September 28, 1850, as extended by Act Cong. March 12, 1860, who at once entered into possession, had color of title under his deed. (*McComas v. Northern Pac. Co.*, 639.)

Adverse Possession—Public Lands—Grant from United States.

5. In view of Act Cong. Feb. 14, 1859, c. 33 (11 Stats. 384), admitting Oregon into the Union, Section 4 of which provides that the people of the state shall provide by an ordinance irrevocable without consent of the United States that the state shall never interfere with the primary disposal of the soil within the same by the United States, when the United States issued patents to land, it thereby made a primary disposal of the soil, and the title so transferred was no more immune from the attack of the state courts than if such conveyance had been executed by a private party, and could be defeated by showing of title by adverse possession. (*McComas v. Northern Pac. Co.*, 639.)

Adverse Possession—Pleading—Complaint.

6. In a suit involving title to land, a complaint alleging that the plaintiffs have had possession of all the land under color of right and by hostile adverse possession, and that they have been in actual occupancy of all the land, that they have held the land in open, plain and notorious possession against the entire world, and that they have been in continuous possession for more than 11 years, constituted an assertion of title by prescription. (*Rasmussen v. Winters*, 674.)

See Tenancy in Common, 1.

AMENDMENT.

See Pleading, 6-8, 10.

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See Pleading, 3-5.

ANIMALS.**Sufficiency of Indictment Charging "Torture" of Animals Without Stating Means.**

See Criminal Law, 7.

APPEAL AND ERROR.**Appeal and Error—Decisions Reviewable—Part of Judgment.**

1. Sections 549, 550, L. O. L., declare that any party to a judgment or decree, not rendered by confession or for want of an answer, may appeal therefrom, or from some specified part. In an action on a note brought against several, the answers of the several defendants raised different issues. There was judgment in favor of one of the defendants and against the others. *Held* that, while the statute does not authorize a party to maintain separate appeals from different parts of a judgment, yet in such case plaintiff might appeal from that part of the judgment in favor of one of the defendants. (*Everding & Farrell v. Toft*, 1.)

Appeal and Error—Time in Which to Serve Notice of Appeal—Statute.

2. Under Section 550, L. O. L., as amended by Laws of 1913, page 617, Section 1, requiring service of a notice of appeal within 60 days from the date of the judgment, and Section 541, declaring that service by mail is deemed complete on the first day after the date of deposit of the notice in the postoffice that the mail leaves such postoffice, a notice of appeal from a judgment rendered May 23, 1916, mailed on July 22d, excluding the day that judgment was rendered and including the last day, was not mailed until the sixty-first day, and was too late, and the appeal will be dismissed. (*Hutchison v. Crandall*, 27.)

Appeal and Error—Record on Appeal—Transcript of Evidence.

3. An appeal will not be dismissed in an equity case, although the transcript of the testimony is not sent up, since the question of the sufficiency of the complaint may nevertheless be considered. (*St. Martin v. Hendershott*, 58.)

Appeal and Error—Record on Appeal—Time of Filing.

4. Although an abstract on appeal was not filed within the time allowed by law, the appeal would not be dismissed where the appellant showed no disposition to delay the hearing. (*St. Martin v. Hendershott*, 58.)

Appeal and Error—Review—Matters Reviewable.

5. On motion to dismiss an appeal, the objection that the transcript and abstract do not intelligibly present any question to be decided will not be considered. (*St. Martin v. Hendershott*, 58.)

Appeal and Error—Abstract of Record—Failure to File.

6. Where no abstract was filed within 20 days after the transcript was filed as required by Supreme Court Rule VI (56 Or. 616, 117 Pac. ix), and no reason given for the neglect, an appeal will be dismissed upon motion. (*Yamhill Sanitary Public Market Co. v. Strowbridge*, 80.)

Appeal and Error—Review—Instructions.

7. Where the instructions correctly present the law, a judgment will not be reversed for mere technical inaccuracies. (*Doerstler v. First Nat. Bank*, 92.)

Appeal and Error—Instructions—Necessity of Requests.

8. Under Section 139, L. O. L., providing that the court shall state to the jury all matters of law thought necessary for their information, but shall not present the facts of the case, and shall tell the jury that they are the exclusive judges of questions of fact, and Section 868, declaring the jury the judges of the evidence, unless it is declared to be conclusive, and that they are to be instructed as to precautionary matters, no failure of the court in submitting a party's theory of the case can be considered on appeal, except upon the denial of a requested instruction directly stating the law applicable to the case. (*Sorenson v. Kribs*, 130.)

Appeal and Error—Instructions—Review.

9. In an action for damages for defendant's misrepresentation of his authority to employ plaintiff's assignor as a broker on behalf of

the owner, where defendant acquiesced in the court's instruction that plaintiff was entitled to the entire commission and interest, or nothing, the defendant had no reason to complain of the court's refusal to instruct that plaintiff could not recover if the agreement was for defendant's payment to plaintiff's assignor of part of the commission to be received from the owner, or that, if the contract between plaintiff's assignor and defendant was for the division of the commission between themselves and another, the verdict should be for the defendant. (*Sorenson v. Kribs*, 130.)

Appeal and Error—Review—Broad Equities of Case.

10. In a law action, where, on appeal, only alleged errors duly assigned can be considered the argument upon the "broad equities" of the case has no place. (*Sorenson v. Kribs*, 130.)

Appeal and Error—Disposition of the Case—Increasing Judgment—Undisputed Evidence.

11. In an action for attorney's fees, where the evidence as to part of the employment and the reasonable value of the services rendered thereunder was undisputed, but the jury returned a verdict only for the amount actually expended by the attorney, the Supreme Court will add to the judgment the uncontroverted value of the services not contested. (*Oliver v. Crane*, 166.)

Appeal and Error—Statute Relating to Time of Taking Appeal—When Appeal will be Dismissed.

12. Under Section 201, L. O. L., providing that upon a jury trial, judgment in conformity with the verdict shall be entered by the clerk on the day the verdict is rendered, Section 548, as amended by Laws of 1911, page 195, providing that a motion for a new trial shall not stay the six months' time formerly limited in which to take an appeal until the motion was determined, and that the appeal to be effectual must be taken within six months from the entry of judgment, and Section 550, as amended by Laws of 1913, page 617, Section 1, subdivision 5, requiring an appeal to the Supreme Court to be taken within 60 days from the entry of the judgment appealed from, an appeal to the Supreme Court must be taken within 60 days from the original entry of judgment, when a motion for new trial is not granted, and otherwise the appeal will be dismissed. (*Stanfield v. Mahon*, 299.)

Appeal and Error—Time to Appeal—Computation.

13. Where defendant moved for judgment *non obstante veredicto*, such motion would not ordinarily suspend the running of the limitation for appeal, in view of Section 201, L. O. L., requiring judgment in conformity with the verdict to be entered on the day of the verdict; but, where the original judgment was modified by dismissal as to one defendant, the appeal time for another defendant runs from the second judgment, and appeal within 60 days thereof is in time. (*Hewey v. Andrews*, 448.)

Appeal and Error—Review—Harmless Error.

14. Error in instructing the jury that they might find against a particular defendant is cured by subsequent vacation of judgment and dismissal of the action against him. (*Hewey v. Andrews*, 448.)

Appeal and Error—Objections—Sufficiency.

15. In an action by a broker for commissions, objection to the admission of parol evidence, on the ground that no parol evidence was

admissible to establish any of the issues in the case because of the statute of frauds (Section 808, L. O. L.), is insufficient to raise the question whether particular parole evidence was admissible, for parole evidence was, of course, admissible to establish some of the issues in the case, such as whether a sale was effected, etc., though the employment could not be established in that manner. (Hewey v. Andrews, 448.)

Appeal and Error—Jurisdiction of Appellate Court.

16. In an action to foreclose a lien on real property outside of the county, where the trial court did not have jurisdiction for that purpose, the Supreme Court does not have jurisdiction on appeal. (First Nat. Bank v. Courtright, 490.)

Appeal and Error—Determination of Case—Decree—Change of Conditions.

17. Where pending an appeal from an order erroneously dismissing a suit for injunction against street paving, for the reason that part of the land of one remonstrant was not to be counted in determining the sufficiency of the remonstrance, the paving had been laid so that the injunction would be ineffectual, a decree will be rendered restraining the city from assessing any of the cost of the improvement against the plaintiffs. (Lais v. Silvertown, 503.)

Appeal and Error—Scope—Sufficiency of Evidence.

18. If there is any competent evidence in the record to sustain the finding of the trial court in a case tried without a jury, the judgment must be affirmed. (Morris v. Leach, 509.)

Appeal and Error—Scope of Review—Preservation of Exceptions.

19. Where no bill of exceptions is attached setting up errors in certain rulings and there is no appeal from such rulings, the specifications of error cannot be considered. (Morris v. Leach, 509.)

Appeal and Error—Harmless Error—Instructions.

20. In action by attorneys for compensation, where it appeared the attorneys did work not contemplated by the terms of their contract, but made no extra charge therefor, and defendant made no counter-claim for damages from plaintiffs' failure to perform their contract, an instruction that, if plaintiffs conducted all the "litigation" which was conducted for the desired end, they were entitled to recover, was not prejudicial to defendants. (Snow v. Beard, 518.)

Appeal and Error—Appellant—Assignee.

21. Section 27, L. O. L., requiring every action to be prosecuted in the name of the real party in interest, Section 38, providing that no action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive, and Section 549, providing that any party to a judgment or decree other than one given by confession or for want of an answer may appeal therefrom, when construed *in pari materia*, do not require a substitution in any case except the death of a party, and under them an assignee, to whom a party has assigned his interest in the property affected by the decree subsequent to its rendition, can appeal from the decree in the name of his assignor. (Meyers v. Hot Lake Sanatorium Co., 587.)

Appeal and Error—Harmless Error—Pleading—Technical Error.

22. In a suit to foreclose a trust deed which provided that, after default, the trustee might institute foreclosure proceedings when requested to do so by the holders of at least one half the outstanding bonds secured thereby, a technical error in the complaint, in stating that a majority of the holders of one half the outstanding bonds had requested the trustee to act, which error was not made a ground of demurrer and was not called to the lower court's attention so that it might be corrected by amendment, does not require a reversal of the decree rendered after a demurrer had been overruled. (*Meyers v. Hot Lake Sanatorium Co.*, 587.)

Appeal and Error—Presenting Questions Below—Necessity—Omission of Material Averment from Complaint.

23. Where the complaint omits a material averment, a decree for complainant will be reversed, though the omission was not called to the lower court's attention by the demurrer. (*Meyers v. Hot Lake Sanatorium Co.*, 587.)

Appeal and Error—Review—New Trial.

24. The trial court having the power, within the time allowed, to set aside a final determination and order a new trial when it discovers a mistake of law has been made which would necessitate a reversal on review the question to be considered on appeal from an order allowing a motion to set aside a verdict and judgment, and for a new trial, because of error committed by overruling a motion for nonsuit and a motion for a directed verdict for defendant because an alleged oral modification of an original written contract was not established, is whether the evidence received in respect to the alleged oral modification was sufficient to authorize a submission of the cause to the jury. (*Wakefield v. Supple*, 595.)

Appeal and Error—Scope of Review—Absence of Bill of Exceptions.

25. In the absence of a bill of exceptions, the appellate court can consider only whether the findings support the judgment. (*Frazier v. Cottrell*, 614.)

Appeal and Error—Change of Theory on Appeal.

26. In a suit involving title to land, where the complaint asserted title by prescription, and the case was tried on that theory, plaintiffs cannot on appeal try the case on the basis of an action to determine a disputed boundary. (*Rasmussen v. Winters*, 674.)

See Criminal Law, 10, 15, 16, 19.

See Eminent Domain, 1, 2.

See Homicide, 11.

APPROPRIATION.

See Waters and Watercourses, 1-4.

ARBITRATION AND AWARD.**Arbitration and Award—Action on Award—Complaint—Sufficiency.**

1. A complaint, in an action upon an award of a board of arbitration fixing the amount due plaintiff on the rescission of his release from defendants, husband and wife, disclosing affirmatively that

the defendant wife did not sign the lease and that it was the act of the husband alone, and that the agreement to arbitrate was the act of the husband, acquiesced in by the wife, and that an award was made against the husband but not against the wife, stated no cause of action against the defendant wife. (*Gosney v. McAlister* 397.)

ASSESSMENT.

For Public Improvements.

See Municipal Corporations, 1-3.

ASSIGNMENTS.

Assignments—Right of Action.

1. A husband's assignment to his wife of his claim against an owner for a commission for effecting a sale of land would not suffice as a transfer of the husband's cause of action against a broker, who misrepresented himself to be empowered by the owner to employ plaintiff's husband; and unless she obtained an assignment of the claim against the agent before action was brought, she could not recover against him. (*Sorenson v. Kribs*, 130.)

Assignments—Right of Action—Question for Jury—Time of Assignment.

2. In an action by a wife as the assignee of her husband to recover damages from defendant for his misrepresentation of his authority from an owner to employ the husband as a broker, *held*, that it was for the jury to determine whether the assignment of the claim was made before the action was commenced. (*Sorenson v. Kribs*, 130.)

Assignments—Validity—Requisites and Sufficiency.

3. A properly dated instrument, addressed to an individual and saying, "Kindly pay J. the rent due January 15, 1915, amounting to \$15.00," and signed by the landlord, prior to the giving of which the assignee had been told by phone by the addressee that he would pay the money on such order, is a sufficient assignment, since it particularly describes a specific fund. (*Morris v. Leach*, 509.)

Assignments—Validity—Effect.

4. Where the evidence shows that notice of an assignment of a specific fund was brought home to the debtor before execution of a writ of attachment and garnishment, such writ is inadmissible in an action by the assignee to recover the fund. (*Morris v. Leach*, 509.)

See Garnishment, 1.

ASSUMPTION OF RISK.

See Trial, 3.

ATTORNEY AND CLIENT.

Attorney and Client—Action for Fees—Answer—Contingent Fee Contract.

1. In an action for attorney's fees, where the complaint alleged that the fees were in part agreed upon and asked for a reasonable value of the balance, an answer generally denying allegations of the complaint "except as hereinafter alleged," and then alleging that the

services were rendered on a contingent fee and no damages were recovered, was sufficient to raise the issue that plaintiff was employed on a contingent fee contract. (*Oliver v. Crane*, 166.)

Attorney and Client—Right of Client to Compromise Suit.

2. The client has a right to compromise a suit or action without the knowledge or consent of his attorney, and even against his protest. (*Snow v. Beard*, 518.)

Attorney and Client—Compensation—Effect of Compromise.

3. Compromise by a client of a case does not affect his attorneys' right to stipulated and earned compensation, in the absence of agreement reducing such compensation. (*Snow v. Beard*, 518.)

Attorney and Client—Action for Compensation—Directed Verdict.

4. In action for attorneys' compensation, *held* not error to deny defendants' motion for directed verdict. (*Snow v. Beard*, 518.)

Attorney and Client—Attorneys' Lien—Property Subject.

5. Where attorneys collected on a judgment \$300 of costs which had been advanced by their clients to pay expenses in preparing for the trial of causes, a lien for their professional services attached thereto, since the object for which the money was advanced had been accomplished, and the costs thus having come into the attorneys' possession in the course of their employment made the sum so received equivalent to a general deposit. (*Snow v. Beard*, 518.)

Attorney and Client—Action for Compensation—Evidence.

6. In such action it was proper to exclude defendant's answer to a question designed to elicit that he has secured other counsel because of plaintiffs' hostile conduct and attitude, where there was no evidence offered by defendants tending to show they were embarrassed or hindered by any act of plaintiffs, or that they lost any rights to a fair trial, since the mental attitude of a witness or his opinion as to hypothetical statement of facts could not be material. (*Snow v. Beard*, 518.)

Attorney and Client—Action for Compensation—Instruction—"Litigate."

7. In action by attorneys for compensation, an instruction that the written contract did not fully set forth what the services were to be, that being for the jury to determine, etc., was not erroneous as directing the jury to consider no services performed by plaintiffs except such as were rendered in litigating causes for their clients; the word "litigate" used in the complaint limiting the service alleged to have been engaged to testing or trying for the clients the validity of disputed claims by suits, actions, or proceedings in courts of law or equity. (*Snow v. Beard*, 518.)

Attorney and Client—Action—Instructions.

8. In action by attorneys for services, an instruction authorizing recovery if plaintiffs had completed their part of the contract up to the time of settlement by their clients *held* proper. (*Snow v. Beard*, 518.)

Attorney and Client—Action for Compensation—Instructions.

9. In action by attorneys for services, an instruction that the attorneys could not be deprived of their rights to the stipulated fee for services by the clients' settling the case was not error, where there was no allegation in the answer of damages from refusal of plaintiffs to proceed with litigation, and thereby compelling settlement. (Snow v. Beard, 518.)

Liability for Attorney's Fees.

See Bills and Notes, 16.

AUTHORITY.

See Principal and Agent, 1-4.

BAD FAITH.

See Bills and Notes, 4.

BAILMENT.**Bailment—Elements.**

1. An order for advertising material, consisting of cuts and font of type to be held at the expiration of the contract subject to the order of the addressee, on acceptance, consummated a contract by which the possession of specific articles of personalty was to be transferred temporarily from the owner to others to accomplish a special purpose, and hence the agreement was a bailment. (Outcault Advertising Co. v. Brooks, 434.)

Bailment—Elements—Delivery.

2. Delivery is the essential element of a bailment, which trust relation begins when the possession of personalty is transferred to the bailee. (Outcault Advertising Co. v. Brooks, 434.)

Bailment—Liabilities of Parties.

3. Under an order by defendants to "ship us at our expense" advertising material to be held subject to plaintiff's order at the termination of the contract, where the plaintiff delivered the advertising matter for shipment to a carrier selected by it before defendants countermanded their order, the defendants are liable for the sum they agreed to pay for use of the advertising matter. (Outcault Advertising Co. v. Brooks, 434.)

Bailment—Contract—Executed Contract—Damages for Breach.

4. Where defendant ordered advertising matter from plaintiff, which was to be used for one year and then held subject to plaintiff's orders, the contract became executed when the goods were delivered to a carrier consigned to defendant, the same as in the case of a sale, and defendant's refusal thereafter to accept the goods did not render the contract executory so as to prevent plaintiff from recovering the entire contract price, and to limit his recovery to damages merely. (Outcault Advertising Co. v. Brooks, 434.)

BANKRUPTCY.**Bankruptcy—Preference—Recovery by Trustee.**

1. Where the enforcement of a judgment obtained against a bankrupt works a preference within the meaning of the Bankruptcy Act

(Act Cong. July 1, 1898, c. 541, 30 Stat. 544), the trustee in bankruptcy is entitled to recover from the judgment creditor the amount received on the judgment. (*Anderson v. Stayton State Bank*, 357.)

Bankruptcy—Preference—Trustee's Action to Set Aside—Grounds.

2. A trustee in bankruptcy cannot question a judgment against the bankrupt unless he alleges and proves his right to appear as the trustee in bankruptcy, which involves the filing of a petition in bankruptcy, an adjudication, his appointment, and his qualification as trustee of the bankrupt. (*Anderson v. Stayton State Bank*, 357.)

Bankruptcy—Petition—Sufficiency.

3. An involuntary petition in bankruptcy, setting forth at least one act of bankruptcy within the definition of Bankruptcy Act, Section 3a (U. S. Comp. Stats. 1913, § 9587), and averring that a judgment was obtained by a bank, and that the judgment creditor attached funds and realized on the judgment in full, was sufficient as against attack by such judgment creditor, the defendant in the trustee's action to set aside such judgment as a preference. (*Anderson v. Stayton State Bank*, 357.)

Bankruptcy—Adjudication—Subpoena—Presumption.

4. An adjudication in bankruptcy of itself imports the existence of all the requisite jurisdictional facts, including the service of a subpoena, especially in a collateral attack. (*Anderson v. Stayton State Bank*, 357.)

Bankruptcy—Election of Trustee—Record.

5. A record, which gave the title of the cause in bankruptcy, and recited that at the time and place for the first meeting creditors appeared by one having a majority of claims in number and amount of those presented for approval, who nominated and elected plaintiff as trustee, in the absence of any showing that the trustee was elected wrongfully, sufficiently showed, for the purpose of plaintiff's action as trustee to set aside an alleged preference to the defendant, that plaintiff was selected in full compliance with Bankruptcy Act, Section 5b (U. S. Comp. Stats. 1913, § 9589). (*Anderson v. Stayton State Bank*, 357.)

Bankruptcy—Trustee's Bond—Title.

6. The approval of the bond of a trustee in bankruptcy constitutes, under Bankruptcy Act, Section 21e (U. S. Comp. Stats. 1913, § 9605), conclusive evidence of the vesting of the title of the bankrupt's property in him. (*Anderson v. Stayton State Bank*, 357.)

Bankruptcy—Preference—Trustee's Action to Set Aside—Grounds.

7. Under Bankruptcy Act, Sections 60a, 60b, as amended (U. S. Comp. Stats. 1913, § 9644), authorizing a trustee in bankruptcy to set aside a preference, the trustee in such action must show that the debtor was insolvent at the time of the entry of the judgment; that he suffered the judgment to be entered within four months of the filing of a petition in bankruptcy; that the enforcement of the judgment obtained for the judgment creditor a greater percentage of its debt than any other creditor of the same class; and that the judgment creditor had reasonable cause to believe that the effect of such judgment was to give a

preference within the meaning of the Bankruptcy Act. (*Anderson v. Stayton State Bank*, 357.)

Bankruptcy—Preference—Judgment—Time.

8. In an action by a trustee in bankruptcy to set aside an alleged preference, the suffering of a judgment to be entered within four months before the filing of the petition in bankruptcy was established by showing that all the proceedings from the commencement of the judgment creditor's action to the entry of its judgment, including the issuance and return of the execution and the enforced payment of the judgment, occurred within four months before the filing of the petition. (*Anderson v. Stayton State Bank*, 357.)

Bankruptcy—Preference—Class—Notes.

9. Claims against a partnership and claims against one of the partners were not in the same class as the notes signed by such partner and the other partner in their individual names in adjustment of a claim against the partnership, in respect to a preference alleged to have been obtained by the holder of such notes. (*Anderson v. Stayton State Bank*, 357.)

Bankruptcy—Partnership—Joint and Several Notes—Claim.

10. The holder of joint and several notes executed by the individuals composing a partnership in the adjustment of a partnership debt might share with claims against the partnership in bankruptcy and at the same time participate in dividends upon claims against the individuals, on the theory that the notes represented a firm indebtedness and at the same time a primary individual obligation. (*Anderson v. Stayton State Bank*, 357.)

Bankruptcy—Individual and Partnership Liabilities—Class.

11. Such holder would be obliged to share with creditors of the same class holding claims against one of the individual partners, but could compel the payment of its notes in full before any dividends were paid out of the individual estate on pure partnership debts, even though there were no firm assets; the course to be pursued being regulated by Bankruptcy Act, Section 5f (U. S. Comp. Stats. 1913, § 9589), declaring that the net proceeds of partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts, and that the surplus of the property of any partner after paying his individual debts should be added to the partnership assets and applied to partnership debts, and the surplus of partnership property, after payment of debts, shall be added to the assets of the individual partners. (*Anderson v. Stayton State Bank*, 357.)

Bankruptcy—Claims—Class.

12. In bankruptcy a pure partnership creditor is not in the same class as a creditor holding a claim against an individual member of the partnership. (*Anderson v. Stayton State Bank*, 357.)

Bankruptcy—Claims—Preference—"Class."

13. Under Bankruptcy Act, Sections 60a, 60b, as amended, relating to preferences as between creditors of the same class, the term "class" defines those creditors who are entitled to receive out of the bankrupt

estate the same percentage of their claims, however much they may have the right to collect from others than the bankrupt, so that in the bankruptcy proceeding of a partnership and both of its members, joint notes signed by the partnership and by each of the partners in the order named, and joint and several notes signed by the partners in adjustment of a partnership debt, belonged to the fourth class of creditors of a partner entitled to the same percentage of dividends, and the enforcement of a judgment on the joint and several notes would work a preference and entitle the trustee to recover from such creditor the amount received on the judgment. (*Anderson v. Stayton State Bank*, 357.)

BANKS AND BANKING.

Banks and Banking—National Bank Examiner—Official of Bank.

1. A national bank examiner is not an agent or officer of a bank which he examines. (*Doerstler v. First Nat. Bank*, 92.)

Banks and Banking—Liability of Bank for Acts of Officers.

2. While a depositor in a national bank is presumed to know that the bank is without authority to lend his funds for his benefit as an individual, the president of a national bank, having made representations to an uneducated depositor that his deposit could be lent so as to be called within 30 days yet bring a fair rate of interest, cannot, the depositor understanding that the president was acting for the bank, make loans of the depositor's funds without rendering the bank liable. (*Doerstler v. First Nat. Bank*, 92.)

BILLS AND NOTES.

Bills and Notes—Indorsement—Rights of Holders.

1. The perpetration of fraud will not alone defeat the holder of a negotiable instrument, but it must be supplemented by a notice to the holder. (*Everding & Farrell v. Toft*, 1.)

Bills and Notes—Indorsement—"Holder in Due Course."

2. Under Section 5885, L. O. L., defining a holder in due course, a person is not a holder in due course if he does not take the note in good faith without notice of any infirmity in the instrument or affecting the title of the person negotiating it. (*Everding & Farrell v. Toft*, 1.)

Bills and Notes—Indorsement—Notice of Defects.

3. A person who takes a note has notice of an infirmity in the instrument or defect in the title if he had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. (*Everding & Farrell v. Toft*, 1.)

Bills and Notes—Indorsement—Bad Faith of Indorsee—"Negligence"—"Bad Faith."

4. While negligence is not synonymous with bad faith, yet where a person takes a note under suspicious circumstances and, having means of knowledge, willfully abstains from making inquiries, his intentional ignorance may result in bad faith. (*Everding & Farrell v. Toft*, 1.)

Bills and Notes—Actions—Questions for Jury.

5. The question of good or bad faith of the holder of a note is peculiarly for the jury and not for the court, especially when the burden rests on the holder to show that he became the holder in due course. (Everding & Farrell v. Toft, 1.)

Bills and Notes—Actions—Burden of Proof.

6. Under Section 5892, L. O. L., providing that when it is shown that the title of any person who has negotiated an instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired title as a holder in due course; when a note had its origin in fraud, the burden is on the owner to prove that he or some person under whom he claims was a holder in due course. (Everding & Farrell v. Toft, 1.)

Bills and Notes—Actions—Admissibility of Evidence.

7. In an action by an indorsee on a note for \$5,000, evidence that the plaintiff acquired the note for \$4,000 is admissible, especially in connection with information received by plaintiff as to one indorser and inquiries made or omitted concerning other indorsers and the maker, as bearing on the question whether the holder was chargeable with bad faith. (Everding & Farrell v. Toft, 1.)

Bills and Notes—Actions—Admissibility of Evidence.

8. A person may resort to circumstantial evidence to show that the owner of a negotiable instrument is not a holder in due course. (Everding & Farrell v. Toft, 1.)

Bills and Notes—Actions—Question for Jury.

9. In an action by an indorsee on a note, evidence held to present a question for the jury as to the good faith of the plaintiff. (Everding & Farrell v. Toft, 1.)

Bills and Notes—Actions—Issues and Proof.

10. Where a complaint on a note charges a defendant with being an indorser in due course of business, he cannot be held liable as a maker or guarantor. (Everding & Farrell v. Toft, 1.)

Bills and Notes—Liabilities of Parties—"Primarily Liable"—"Secondarily Liable."

11. Under Section 6023, L. O. L., providing that the person who by the terms of an instrument is absolutely required to pay is primarily liable and all other parties are secondarily liable, the maker of a note is primarily liable while the indorser is secondarily liable. (Everding & Farrell v. Toft, 1.)

Bills and Notes—Indorsement—"Discharge" of Indorser.

12. Section 5953, subdivision 3, L. O. L., declaring that a person secondarily liable on an instrument is discharged by discharge of a prior party, applies only to a discharge by act of the creditor, and does not include discharges by operation of law, nor where, after a trial on the merits, the note is destroyed because of a vice inherent in the transaction. (Everding & Farrell v. Toft, 1.)

Bills and Notes—Actions—Instructions.

13. Where, after a trial on the merits, it is determined that because of fraud and notice there is no subsisting debt of the maker of a note,

there is no debt of an indorser, and it is error to instruct that there may be a verdict in favor of the maker, but against the indorser. (Everding & Farrell v. Toft, 1.)

Bills and Notes—Non-negotiable Instruments—What Constitute.

14. A promissory note, by which the maker agreed to pay a sum certain for value received on a date certain, with interest, which recited that it was given for the purchase of a threshing machine, to which title was reserved in the payee of the note, with right to declare forfeiture at any time for nonpayment, even before the due date, is a non-negotiable instrument. (Western Farquhar Mach. Co. v. Burnett, 174.)

Bills and Notes—Non-negotiable Instrument—Purchasers in Good Faith—Rights.

15. The purchaser of a non-negotiable instrument takes it subject to all the equities between the original parties, so that, where a note was given for the purchase price of a thresher under warranty and the machine was not as warranted, it was unnecessary to show that the payee was the agent of the assignee in making the sale. (Western Farquhar Mach. Co. v. Burnett, 174.)

Bills and Notes—Form—Joint Note.

16. Notes containing the language, "We promise to pay to the order of" the payee, signed by a lumber company and by each of the partners doing business under such firm name, were "joint notes." (Anderson v. Stayton State Bank, 357.)

Bills and Notes—Form—"Joint and Several Note."

17. Notes executed in adjustment of a claim against a partnership doing business under the firm name and style of a company, after the time for payment had been extended and the firm had paid the interest, signed by each of the partners, were "joint and several notes" within Section 5850, L. O. L., declaring certain notes to render the signers jointly and severally liable thereon. (Anderson v. Stayton State Bank, 357.)

Bills and Notes—Joint and Several Note—Liability—Consideration.

18. Where joint and several notes executed by the partners of a firm originated in a partnership indebtedness to a third party, the extension of time for the payment of such indebtedness granted by the creditor's assignee furnished a sufficient consideration for the liability which the individual partners incurred when they signed such notes. (Anderson v. Stayton State Bank, 357.)

Bills and Notes—Liability for Attorney Fees—Demand of Payment.

19. Since the Negotiable Instruments Act (Sections 5903, 5905, 5906, 5907, 5911, L. O. L.), requiring a formal demand of payment of a note, expressly relates only to the demand necessary to charge an indorser or some other person secondarily liable, it follows from the maxim "*Expressio unius est exclusio alterius*," that any reasonable request to pay a demand note, containing a provision for the payment of attorney's fees, is sufficient to put the maker in default, if he fails to discharge his obligation. (Hodges v. Blaylock, 179.)

Bills and Notes—Demand for Payment—Waiver of Presentation.

20. The maker of a demand note waived its actual presentation upon a demand for payment by not asking for it, and by refusing payment on the ground that he did not then have the money and that he needed the amount to support his family. (*Hodges v. Blaylock*, 179.)

See Bankruptcy, 9, 10.

Failure of Consideration.

See Evidence, 7, 8.

See Partnership, 4.

BOUNDARIES.**Boundaries—Establishment—Statutory Proceedings—Validity.**

1. Where adjoining land owners had their boundary line surveyed, and agreed that the line established should be the boundary line, and acted on such agreement for many years, and defendant took the land subject to such agreement, a proceeding by defendant under Section 2991, L. O. L., against the county surveyor, to establish the boundary, is a nullity as to the adjoining owner. (*McCully v. Heaverne*, 650.)

Boundaries—Possession—Evidence.

2. In a suit to quiet title involving the ascertainment of boundary lines, the fact that defendant, six months after the commencement of the suit, was attempting to obtain possession by inclosing the land with a fence, was of itself evidence that she did not actually have possession. (*McCully v. Heaverne*, 650.)

Boundaries—Evidence—Sufficiency.

3. In a suit involving title to lands, evidence based on map on which surveyor had noted that the lines do not purport to be established in accordance with the legal subdivisions of quarter sections held insufficient to establish the boundary line as claimed by plaintiffs. (*Rasmussen v. Winters*, 674.)

BURDEN OF PROOF.

See Bills and Notes, 6.

See Evidence, 6.

See Fraudulent Conveyances, 1, 4.

See Principal and Agent, 3.

See Schools and School Districts, 2.

See Waters and Watercourses, 6.

CARRIERS.**Carriers—Delay in Transporting Livestock—Evidence.**

1. Evidence in an action for delay in transporting livestock, held to sustain a finding that the cattle were ready to be loaded, in accordance with an arrangement with the carrier, at the time of the departure of the train. (*Blackwell v. Oregon Short Line Ry. Co.*, 303.)

Carriers—Shipping of Livestock—Delivery to Carrier.

2. A shipper and the carrier may make such stipulations upon the matter of delivery to the carrier as they see fit, and when so made they are to govern. (*Blackwell v. Oregon Short Line Ry. Co.*, 303.)

Carriers—Shipping of Livestock—Notice of Delivery to Carrier.

3. Where the station agent and conductor of a common carrier were informed the day before an intended shipment that the cattle were to be put into the pens for shipment according to custom, no further formal notice was necessary. (*Blackwell v. Oregon Short Line Ry. Co.*, 303.)

Carriers—Shipping of Livestock—Acceptance of Shipment.

4. Where, in accordance with a recognized custom, a shipper notified the railroad company that he intended to ship a certain number of cattle next day, and had them ready to be loaded upon the arrival of the train, such acts, known to the carrier and not objected to, constituted a delivery and an acceptance of the shipment; no written receipt or bill of lading being necessary. (*Blackwell v. Oregon Short Line Ry. Co.*, 303.)

Carriers—Shipping of Livestock—Liability.

5. The liability as common carrier begins with the actual delivery of the goods for transportation, and not merely with the formal execution of a receipt or bill of lading. (*Blackwell v. Oregon Short Line Ry. Co.*, 303.)

Carriers—Shipping of Livestock—Delay—Evidence.

6. In an action for damages for delay in transporting a shipment of livestock, evidence as to its market value at destination and of shrinkage per head held admissible; the value at the point of shipment and at destination being concededly the same except for the shrinkage. (*Blackwell v. Oregon Short Line Ry. Co.*, 303.)

Carriers—Carriage of Livestock—Delay—Damages.

7. In an action for damages through delay in transporting a shipment of livestock, an instruction that the measure of damage would be the depreciation in the value of the animals caused by the negligent delay held proper. (*Blackwell v. Oregon Short Line Ry. Co.*, 303.)

Carriers—Delay in Shipment—Actions—Parties.

8. Where the agent of a common carrier is joined as defendant in a suit for damages for delay in a shipment of livestock, but no cause of action is stated against him, and instructions are given as though the carrier were the sole defendant, his name should be stricken from the judgment. (*Blackwell v. Oregon Short Line Ry. Co.*, 303.)

CASES IN THE OREGON REPORTS.

Applied, Approved, Cited, Distinguished, Followed and Overruled in this Volume.

See Table in Front of this Volume.

CHARTER OF CITIES.

- Port of Portland—*Rose v. Port of Portland*, 541.
 Stevenson v. Port of Portland, 576.
 Portland—*Hancock Land Co. v. Portland*, 85.
 Portland—*Cormack v. Cormack*, 108.
 Roseburg—*Giles v. Roseburg*, 67.
 Woodburn—*Woodburn v. Public Service Commission*, 114.

CHattel MORTGAGES.

Chattel Mortgages—Conditional Sales—Costs on Foreclosure.

1. Where vendee in conditional sales contract gave a real estate mortgage as additional security, the vendor was not allowed attorney's fee on foreclosure of chattel mortgage evidencing vendor's lien, in addition to attorney's fee for foreclosure of real estate mortgage; both foreclosures being for the enforcement of the same obligation. (*International Harvester Co. v. Bauer*, 686.)

CITIES.

See Municipal Corporations.

CITY CHARTERS.

See Charter of Cities.

CITY ORDINANCES.

See Municipal Corporations.

CLAIMS.

See Bankruptcy, 10, 12, 13.

COMPENSATION.

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CONCLUSIVENESS.

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CONDITIONAL SALES.

See Chattel Mortgages, 1.
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CONSIDERATION.

See Bills and Notes, 20.
 See Evidence, 7, 8.

CONSOLIDATION.

See Schools and School Districts, 2-4.

CONSPIRACY.

See Criminal Law, 13, 14.

CONSTITUTIONAL LAW.**Constitutional Law—Police Power.**

1. When an owner devotes his property to a use in which the public has an interest, he must submit to be regulated and controlled by the public for the common good. (*Woodburn v. Public Service Commission*, 114.)

Constitutional Law—Impairment of Contracts—Telephone Rates.

2. If a telephone company's franchise from a city, limiting rates to be charged, is deemed a contract, the mere fact that it was made prior to the enactment of the Public Utility Act (Laws 1911, p. 483), and before the state attempted to regulate such rates, does not debar the state from increasing the rates as fixed in the franchise, because when the state exercises its police power, it does not work any impairment of obligation of the contract; the possibility of the exercise of such power being an implied term of the contract. (*Woodburn v. Public Service Commission*, 114.)

Constitutional Law—Rate-fixing Power—Delegation to Municipality.

3. Since the right to regulate rates is an inherent element of sovereignty, such right can be delegated to a municipality only by clear and express terms, and all doubts must be resolved against the municipality. (*Woodburn v. Public Service Commission*, 114.)

Constitutional Law—Validity of Statute—Presumption.

4. The presumption is always in favor of the validity of the statute, and its repugnancy to the Constitution must clearly appear. (*Clayton v. Enterprise Electric Co.*, 149.)

Constitutional Law—Counties—Right to Sue—Injuries to Employees—Self-executing Provisions.

5. Since an injured workman's action for damages under Employers' Liability Act (Laws 1911, p. 16) is a tort action, and a county, under Section 358, L. O. L., can be sued on its contracts and not otherwise, he cannot recover, in spite of Article I, Section 10, of the Constitution, providing that every man shall have a remedy by due course of law for any injury; such provision, as regards counties, not being self-executing. (*Clark v. Coos County*, 402.)

Constitutional Law—Initiated Amendments—Construction.

6. In the construction of initiated constitutional amendments, the intent of the people should be ascertained and given full effect, without straining any of the language, or distorting it, or giving it an unnatural meaning, but according every word, clause and sentence whatever consistent meaning the context naturally suggests. (*Rose v. Port of Portland*, 541.)

Constitutional Law—Initiated Amendments—Construction Together.

7. Initiated constitutional amendments, adopted by the electorate at the same time must be construed together. (*Rose v. Port of Portland*, 541.)

See Drains, 1, 2.

See Municipal Corporations, 4, 11.

See Statutes, 2, 3.

CONSTRUCTION.

See Constitutional Law, 6, 7.
 See Corporations, 1.
 See Electricity, 1.
 See Insane Persons, 1.
 See Municipal Corporations, 10.
 See Pleading, 8.
 See Principal and Agent, 2.
 See Statutes, 1.
 See Trial, 9.
 See Vendor and Purchaser, 2.

CONTRACT.**Contracts—Joint and Several Contract—Liability of Promisor.**

1. A joint and several contract is with each promisor and also with all jointly, with the result that they are all jointly liable, and each individual is liable upon his separate obligation, and they may be sued jointly or severally as the promisee may elect. (*Anderson v. Stayton State Bank*, 357.)

Contracts—Judgment—Joint Contract—Nature of Obligation.

2. A joint contract is with all the promisors together, with the result that all must be sued jointly if either promisor objects to a suit or action brought against less than all; but, if a judgment is obtained without objection against less than all who are jointly liable, the entire debt is merged in the judgment. (*Anderson v. Stayton State Bank*, 357.)

Contracts—Modification—Written Contracts—Subsequent Parol Agreement.

3. The terms of a written contract may be altered by a subsequent parol agreement of the parties. (*Wakefield v. Supple*, 595.)

Contracts—Evidence—Sufficiency.

4. In an action to recover compensation for additional work done, not contemplated in an original written agreement, but alleged to have been authorized by a subsequent parol modification of the written contract, evidence of conversations and correspondence between the parties held insufficient to go to the jury as tending to establish that the alleged subsequent oral agreement modifying the written contract was made. (*Wakefield v. Supple*, 595.)

See Bailment, 4.
 See Evidence, 12.
 See Husband and Wife, 1.
 See Joint Adventures, 1, 2.
 See Mechanics' Liens, 1, 2.
 See Specific Performance, 1-5.
 See Vendor and Purchaser, 2.

Contingent Contract for Attorney's Fee.

See Attorney and Client, 1.

Damages for Breach of Contract.

See Bailment, 4.

Fixing Telephone Rates by State not Impairment of Contract.

See Constitutional Law, 2, 3.

CONTRACTOR.

See Mechanics' Liens, 6, 7.

CORPORATIONS.**Corporations—Trust Deed—Construction—Right to Foreclose.**

1. A trust deed, securing corporate bonds, one article of which authorized the trustee to institute foreclosure proceedings when any default in the payment of interest or principal should continue for six months and another article of which provided that in case of default in the payment of interest or any of the principal, the trustee might, at the request of the holder of one half the outstanding bonds, declare the entire amount of the bonds due, and authorized the holders of a majority of the bonds to compel the trustee to so declare or to waive the exercise of the power, or to annul its exercise and to direct the trustee to dismiss any suit begun by it, authorizes the trustee to institute foreclosure proceedings before the default in the payment of interest had continued six months, if requested to do so by the holders of a majority of the bonds. (*Meyers v. Hot Lake Sanatorium Co.*, 587.)

COUNTIES.**Counties—Liability—Acts of Officers.**

1. In the absence of statute, a county is ordinarily not liable for defaults of its officers. (*State ex rel. v. Multnomah County*, 428.)

Counties—Statute Imposing Liabilities.

2. Laws of 1915, Chapter 62, making a county liable for money lost by a former county clerk by failure of a bank in which he deposited a litigant's funds, should be strictly construed. (*State ex rel. v. Multnomah County*, 428.)

Counties—Officers—Liabilities—Clerk.

3. A county clerk is not liable for money which never came into his possession. (*State ex rel. v. Multnomah County*, 428.)

See Constitutional Law, 5.

COUNTY ROADS.

See Highways.

COURTS.**Courts—Jurisdiction—State and Federal Courts—Swamp-lands—Title.**

1. Where the state's selection of swamp-lands was rejected by the General Land Office, and no patent for any part of the land has ever been granted, title thereto is in the United States, and while it so remains a state court is powerless legally to interfere therewith. (*McComas v. Northern Pac. Co.*, 639.)

Courts—State Courts—Jurisdiction—Government Lands.

2. Although a state court is powerless to interfere with the title of the United States to lands, when two parties are seeking to obtain title to government lands, it is the duty of the court to protect the possession of him who apparently has the better right until the controversy can be adjudicated by the agencies appointed by the United States for that purpose. (*McComas v. Northern Pac. Co.*, 639.)

CREDITORS.

See Fraudulent Conveyances, 1-3.

CRIMINAL LAW.**Criminal Law—Harmless Error.**

1. Admission of testimony of a girl friend of deceased that she (deceased) had told her that she would stay home because accused was coming to see her that evening was not prejudicial, where without objection there remained in the record, upon answer to cross-examination, a statement of a state's witness that deceased had told some girls that she had received a letter from accused, and could not go out with them because accused was coming to see her that evening. (*State v. Farnam*, 211.)

Criminal Law—Evidence—Competency.

2. If evidence is competent for one purpose, it cannot be rejected merely because it is not competent for another purpose, although an instruction, limiting its effect, is proper. (*State v. Farnam*, 211.)

Criminal Law—Evidence—Declarations of Third Persons.

3. Evidence of declaration of third person, tending to show he committed the homicide, is inadmissible. (*State v. Farnam*, 211.)

Criminal Law—Evidence—Real Evidence.

4. The admission in evidence of material objects or allowing inspection of the same, whether offered in evidence or not is within the discretion of the court. (*State v. Farnam*, 211.)

Criminal Law—Evidence.

5. The refusal six months after the homicide to allow the jury to inspect the feet of a horse upon whose tracks the prosecution relied was not an abuse of the court's discretion as to admitting in evidence material objects or allowing inspection of the same. (*State v. Farnam*, 211.)

Criminal Law—Justices of the Peace—Jurisdiction of Subject Matter cannot be Waived.

6. On appeal from a conviction in a Justice's Court, the only jurisdiction acquired by the Circuit Court is simply that of an appellate tribunal, and once a question of jurisdiction presents itself in any stage of a proceeding, and it is discovered that the court has no jurisdiction of the subject matter, it is the duty of the court to refuse to proceed further, for jurisdiction over the subject matter cannot be waived. (*State v. Goodall*, 329.)

Criminal Law—Indictment and Information—Sufficiency of Statement—Statutes.

7. Where the facts stated in the complaint show that the defendant has done something that the law prohibits, such pleading is sufficient under the statute, and any objection to the information is waived by failure to specifically demur, on the ground that it does not set out the offense with the particularity required by Title XVIII, Chapter 7, of Civ. Code, except as to the jurisdiction of the court or that the complaint does not state facts sufficient to constitute a crime. (*State v. Goodall*, 329.)

Criminal Law—Evidence—Admissibility.

8. In a murder case, where it appeared that the footprints of a man and woman and a woman's hair-rat were found in the vicinity of the body, evidence that a codefendant, wife of deceased, had been seen by several witnesses near the scene of the crime shortly after a shot had been heard, that deceased was jealous of a supposed intimacy between defendant and his wife to defendant's knowledge, and of subsequent comparison of the hair-rat with those used by the wife, was admissible as a narration of the circumstances so closely connected with the issue as to be a part of the *res gestae* and tending to show joint action, and was not evidence of declaration and acts of a co-conspirator before proof of conspiracy forbidden by Section 727, subdivision 6, L. O. L. (*State v. Branson*, 377.)

Criminal Law—Trial—Statements of Counsel.

9. The action of the court in permitting the district attorney, in his opening statement to the jury, to announce his intention to prove that defendant and codefendant, wife of deceased, had been seen together under peculiar circumstances, although with the purpose of raising a suspicion of adultery and thereby establishing a motive for the killing, was not error. (*State v. Branson*, 377.)

Criminal Law—Appeal and Error—Review—Instructions.

10. The refusal of a requested instruction fully covered by the given instructions was not error. (*State v. Branson*, 377.)

Criminal Law—Trial—Instructions.

11. Where there was no evidence of a conspiracy or common design between defendant and codefendant to murder, a qualification of an instruction on alibi that, if defendants were acting together with a common design to bring about the death of deceased, it would not be necessary for both of them to have been actually present at the crime but each is bound by the act of the other in furtherance of the common design, was error. (*State v. Branson*, 377.)

Criminal Law—Review—Reversal.

12. Although Article VII, Section 3, of the Constitution, as amended in 1911, provides that, if the Supreme Court shall be of opinion that the judgment of the court appealed from was such as should have been rendered in the case, such judgment should be affirmed, notwithstanding any error committed during the trial in a murder case, where the court erroneously instructed the jury as to conspiracy between codefendants, the appellate court may not determine what influence the elimination of the question of conspiracy

would have upon the jury's determination, and judgment must be reversed. (State v. Branson, 377.)

Criminal Law—Evidence—Declarations of Conspirator—Statute.

13. Under Section 727, subdivision 6, L. O. L., providing that after proof of a conspiracy the declarations or acts of a conspirator against his co-conspirator relating to the conspiracy may be admitted, declarations of an alleged co-conspirator, jointly indicted and separately tried, were inadmissible, where no evidence of a conspiracy had been offered. (State v. Booth, 394.)

Criminal Law—Instructions—Conspiracy—Evidence.

14. In a trial for homicide under a joint indictment with a separate trial, an instruction upon conspiracy to commit crime, though proper as abstract statement of law, was erroneous, where there was no evidence of a conspiracy or common design on the part of the defendants to take the life of the deceased. (State v. Booth, 394.)

Criminal Law—Appeal—Record—Transmission.

15. The time fixed by law for the filing of a transcript on appeal cannot be extended by stipulation of the parties without an order of court. (State v. Keeney, 400.)

Criminal Law—Appeal—Record—Transmission.

16. After the expiration of the statutory time for filing copies of the transcript in a criminal case, neither the trial court nor appellate court can extend the time by order *nunc pro tunc*; the right of appeal being purely statutory. (State v. Keeney, 400.)

Criminal Law—Evidence of Settlement—Admissibility.

17. In prosecution for larceny of two horses from a range, statement of a witness that the defendant in an interview with him had "evidenced a desire" to have the case settled out of court if possible was inadmissible, since it does not impute to the defendant any utterance whatever. (State v. McLennan, 621.)

Criminal Law—Evidence of Settlement—Admissibility.

18. It was also inadmissible for the reason that there is nothing inculpatory in wishing to get a case "settled." (State v. McLennan, 621.)

Criminal Law—Appeal and Error—Prejudicial Error.

19. In a prosecution for larceny of two horses from the range, error in the admission of testimony of witness that accused had evidenced a desire to get the case settled out of court if possible was cured by the court's action in withdrawing the testimony from the consideration of the jury. (State v. McLennan, 621.)

Criminal Law—Evidence—Other Offenses—Admissibility.

20. In a prosecution for larceny of two horses from the range, evidence that the defendant had changed the brand on the animals and that he was concerned in killing them, although tending to prove distinct crimes separate from the one mentioned in the indictment, was admissible as tending to show a general plan or as an attempt to conceal his offense. (State v. McLennan, 621.)

Criminal Law—Trial—Instructions.

21. In a prosecution for larceny of two horses from the range, as the killing of the horse by the defendant might be equally attributed to the commission of malicious mischief, defined in Section 1969, L. O. L., or to a desire to conceal the alteration of a brand, defined by Section 1954, or to the destruction of stolen property to aid in evading the consequences of the larceny, an instruction that, if the jury found from the evidence beyond a reasonable doubt that defendants killed the horses in question for the purpose of concealment, they might consider the same as tending to show the guilt of defendant of the charge of the indictment, was error, since, if the conclusion to be drawn from the circumstances in question is equivocal, it is for the jury alone to say what influence and what direction shall be accorded the evidence on the point. (State v. McLennan, 621.)

Criminal Law—Evidence—Judicial Notice.

22. It is common knowledge, not requiring expert testimony, that a putrescent or desiccated carcass has been dead longer than one the flesh of which presents no indications of decay. (State v. McLennan, 621.)

Criminal Law—Evidence—Admissibility.

23. Whether the body is stiff or relaxed, whether the gases of decomposition have distended it or not, the temperature and moisture prevalent at the time, as well as other factors, are phenomena to be considered in estimating how long a body probably has been dead. (State v. McLennan, 621.)

Criminal Law—Experts—Qualification.

24. In a prosecution for larceny of two horses from the range in which it appeared that the horses had been found dead after they were discovered in the possession of the defendant by the prosecutor, in the absence of testimony as to whether the witnesses who had butchered cattle, sheep or hogs had made any systematic or extended observation as to the condition of the carcasses and surrounding circumstances, their opinion as to how long the horses had been dead should not have been admitted. (State v. McLennan, 621.)

Criminal Law—Experts—Qualification.

25. In any event they should have described to the jury the appearance and *indicia* upon which they based their judgment, since even an expert cannot give an opinion upon facts not communicated to the jury. (State v. McLennan, 621.)

See Witnesses, 1, 2.

CRUEL AND INHUMAN TREATMENT.

See Divorce, 3.

CUSTOM AND USAGE.

See Taxation, 3.

DAMAGES.

See Bailment, 4.

See Carriers, 7.

See Principal and Agent, 1, 2, 4.

DEATH.**Death—Presumption of Death from Absence—Statute.**

1. By Section 799, subdivision 26, L. O. L., there is a presumption that a person, not heard from by his acquaintances or any members of his family for more than seven years, is dead. (St. Martin v. Hendershott, 58.)

DECLARATIONS.**Of Third Persons.**

See Criminal Law, 2.

Of Deceased Person.

See Homicide, 7.

DECREES.

See Appeal and Error, 16, 17.

DEDICATION.**Dedication—Street—Sufficiency of Evidence.**

1. In an action to enjoin a city and its contractor from entering upon and excavating a part of plaintiff's land for the improvement of a street, evidence held not to show a dedication of the strip in dispute as a part of the street. (Christie v. Bandon, 481.)

Dedication—Requisites—Intent.

2. The public, whether in the form of a municipality or otherwise, cannot acquire the real property of a private holder by dedication, unless the intent of the owner thus to give his realty to the public is clearly and satisfactorily established. (Christie v. Bandon, 481.)

Dedication—Statute—Acknowledgment—Signature.

3. A declaration on a recorded plat that the owner extended one of the streets over adjoining land owned by him, but not platted, and dedicated the extension, which was not signed or acknowledged by the owner and was accompanied by no map, was not a statutory dedication. (Lais v. Silvertown, 503.)

Dedication—Estoppel—Private Way.

4. Where the owner of three tracts of land lying in a row had platted one of the end tracts and dedicated the streets thereon and then sold the other end tract with an agreement to give a way through the center tract on a line continuing one of the platted streets, and attempted to perform that agreement by doing a dedication of such extension on the recorded plat, but the way was very little used or improved, and the two unplatted tracts later came into the possession of the same owner, there was no dedication of the extension of the street by estoppel. (Lais v. Silvertown, 503.)

DEEDS.

See Adverse Possession, 4.

See Corporations, 1.

See Evidence, 9.

See Fraudulent Conveyances, 1-3.

See Religious Societies, 1.

DEFINITIONS.

See Words and Phrases.

DELIVERY.

See Carriers, 2, 3.

DEMAND.

See Bills and Notes, 16, 17.

DEMURRER.

See Pleading, 1.

But One Demurrer to a Pleading.

See Pleading, 2.

DEPARTURE.

See Pleading, 11.

DESCENT AND DISTRIBUTION.

Descent and Distribution—Wills—Liability of Heir.

1. The liability of an heir and devisee is confined to the real estate, with which the administrator or executor has nothing to do. (Rainey v. Rudd, 461.)

DEVISEE.

Liability of Heir and Devisee for Decedent's Debts.

See Descent and Distribution, 1.

DISCHARGE.

See Bills and Notes, 12.

DISCRETION OF COURT.

See Pleading, 10.

See Trial, 13.

DISMISSAL AND NONSUIT.

See Trial, 10.

DIVORCE.

Divorce—Grounds—"Cruelty."

1. In a wife's action for divorce, where the evidence shows that defendant treated plaintiff in a cruel and inhuman manner, with personal indignities, cursing her, striking her, bruising her arm and neglecting her when she was in ill health, thereby rendering her life burdensome, plaintiff was entitled to a divorce on the ground of cruelty. (Belmont v. Belmont, 612.)

Divorce—Allowance—Money Invested.

2. Where a wife was granted a decree of divorce, she was entitled to judgment against the defendant for a sum invested by her in real estate, which shall be a lien on the defendant's interest therein. (Belmont v. Belmont, 612.)

Divorce—Cruel and Inhuman Treatment—Evidence—Sufficiency.

3. Evidence held to show such cruel and inhuman treatment by abusive cursing, ill temper and lack of support as to warrant decree of divorce for the wife. (Coos v. Coos, 695.)

DOCUMENTARY EVIDENCE.

See Evidence, 3.

DOWER.**Dower—Mortgage—Effect—Statute.**

1. Under Section 7289, L. O. L., relating to dower in land mortgaged for purchase money, the fact that a married woman made no contract, barring her inchoate right of dower, when plaintiff took possession and made improvements under an oral contract with her husband, was of no consequence, where she afterward joined her husband in executing to defendants a purchase-money mortgage, as the foreclosure of that lien and a sale of the premises under the decree concluded all the estate she had in the realty. (Skinner v. Furnas, 414.)

DRAINS.**Drains—Drainage District Bonds—Statutes Repealed.**

1. Laws of 1915, Chapter 340, not effective when a drainage district adopted its by-law, but effective before its directors ordered an election to determine whether they could issue bonds, and relating to the organization of drainage districts and covering the field formerly covered by Sections 6126-6145, L. O. L., inclusive, as amended by Laws of 1911, Chapters 241, 250, and itself providing for the issuance of bonds and for what had been previously left to be done by the district through by-laws, though not dissolving drainage districts then in existence, was a substitute for and by implication repealed prior legislation, so that the district's bonds were required to be issued thereunder. (State ex rel. v. Mehaffey, 683.)

Drains—Drainage District—Legislation—Constitutional Provisions.

2. Article XI, Section 2, of the Constitution, relating to the enactment of municipal charters, and Article IV, Section 1a, providing for the initiative and referendum on local, special and municipal laws, did not render drainage districts immune from statutes passed by the legislative assembly, so that the Assembly was empowered to enact Laws of 1915, Chapter 340, relating to the organization of drainage districts and purporting to cover the matters formerly covered by Sections 6126-6145, L. O. L., inclusive, as amended by Laws of 1911, Chapters 241, 250. (State ex rel. v. Mehaffey, 683.)

ELECTION.**Annexation of School District.**

See Schools and School Districts, 1-4.

ELECTRICITY.**Electricity—Regulation—Construction of Statutes.**

1. The title of the employers' liability law (Laws 1911, p. 16) indicated that the act provided for the protection and safety of persons engaged in construction or other work upon buildings and other structures, or upon or about electrical wires, conductors or other electrical appliances carrying a dangerous current of electricity, or about any machinery or in any dangerous occupation, and defining the liability of employers for acts of negligence, or for the injury or death of their employees. Section 1 provided that all persons whatsoever engaged in the manufacture, transmission and use of electricity should see that all material was carefully selected, inspected and tested, and that in the transmission and use of electricity of a dangerous voltage full and complete insulation should be provided at all points where the public or the employees were liable to come in contact with the wires, and that all persons having charge of or responsible for any work involving a risk or danger to the employees or the public should use every device, care and precaution which it is practicable to use for the protection of life and limb. Section 4 made any person within the provisions of the act liable for any loss of life by violation thereof. *Held*, that the act was intended to safeguard members of the public from coming in contact with wires carrying a dangerous current, and was not limited to the protection of the immediate employees of electric companies. (*Clayton v. Enterprise Electric Co.*, 149.)

Electricity—Actions for Injury—Sufficiency of Evidence—Ownership of Wires.

2. In an action for the death of an employee of a patron of an electric power company, when he attempted to turn off the switch in his employer's pumping plant, evidence *held* sufficient to take to the jury the question whether the power company owned and controlled the wires and switch. (*Clayton v. Enterprise Electric Co.*, 149.)

Electricity—Degree of Care Required.

3. The care demanded of electric companies must be commensurate with the danger, and where their wires are carrying a dangerous current, the law imposes upon them the utmost degree of care in the construction, inspection and repair. (*Clayton v. Enterprise Electric Co.*, 149.)

Electricity—Liability of Company—Ownership of Switch.

4. Where an electric power company furnishes the current for operating a pump owned by an individual, and owns the wires leading to the switch, which was installed by the company's predecessors, the company can exercise control over the switch, even if it does not own it, and is liable under the employers' liability law if the switch is defective. (*Clayton v. Enterprise Electric Co.*, 149.)

Electricity—Liability of Companies—Installation of Apparatus.

5. Where an electrical company undertakes to render service to a customer, and runs its wires into a building, and installs its apparatus therein, it must exercise a degree of care commensurate with the risk in protecting and insulating its wires and installing the apparatus. (*Clayton v. Enterprise Electric Co.*, 149.)

EMINENT DOMAIN.**Eminent Domain—Appeal and Review—Waiver of Appeal.**

1. A municipality, in condemnation proceedings to secure property for sidewalk purposes, waives its appeal from judgment fixing damages by taking and using the property pending the appeal. (*Portland v. Schmid*, 465.)

Eminent Domain—Appeal and Review—Waiver of Appeal.

2. An appeal by a municipality from judgment in condemnation proceedings fixing damages for sidewalk property will be held waived where the city constructed the sidewalk pending appeal, notwithstanding that thereafter, on advice of the city attorney, sidewalk was removed by city. (*Portland v. Schmid*, 465.)

EMPLOYERS' LIABILITY ACT.

See Constitutional Law, 5.

See Electricity.

ESTOPPEL.**Estoppel—Persons to Whom Estoppel is Available.**

1. A statement to a national bank examiner by a depositor in reply to a question by the examiner as to whether loans by the president of the bank were authorized furnishes no basis for an estoppel in favor of the bank and against the depositor; the examiner not being an officer or agent of the bank. (*Doerstler v. First Nat. Bank*, 92.)

Estoppel—Equitable Estoppel—Definition.

2. An "estoppel" may be defined as where a man is concluded and forbidden to speak against his own act or deed, though it is to say the truth. (*Doerstler v. First Nat. Bank*, 92.)

See Dedication, 4.

See Specific Performance, 5.

EVIDENCE.**Evidence—Presumption—Doing of Prior Act.**

1. When the legality of a subsequent act depends upon the doing of a prior act, proof of the performance of the subsequent act may carry with it, until the contrary is shown, the presumption that the prior act was correctly done, the rule of presumption being not necessarily conclusive. (*State ex rel. v. Evans*, 46.)

Evidence—Secondary Evidence—Admissibility.

2. The contents of a written instrument which the opposite party did not produce on demand cannot be established by testimony as to the witnesses' conclusion as to its legal effect, but its language must be given so that the court may determine its legal effect. (*Toomey v. Casey*, 71.)

Evidence—Documentary Evidence—Secondary Evidence.

3. Section 712, L. O. L., declares that there shall be no evidence of the contents of a writing other than the writing itself, save when the

original is in possession of the party against whom the evidence is offered, and he withholds it after demand, etc., while Section 782 declares that the original writing shall be produced and proved unless it be in the custody of the adverse party and he fails to produce it after reasonable notice, in which case evidence of the contents is admissible. *Held* that, in an action against his lessees, whom plaintiff claimed had assigned their lease to a third person, a notice on the lessees to produce the assignment does not warrant the introduction of secondary evidence, for it must be presumed that the assignment would be in the possession of the assignee. (*Toomey v. Casey*, 71.)

Evidence—Admissions of Counsel.

4. On appeal in a suit against a city to cancel an assessment of realty and to enjoin its sale, where defendant's counsel admitted that the proof of the posting of notices of the proposed improvement originally filed did not meet the requirements of Portland City Charter, Section 376, and that, if the proceedings were based only on such proof, there was a lack of jurisdiction, the court would assume that the proof submitted was inadequate. (*Hancock Land Co. v. Portland*, 85.)

Evidence—Presumptions—Rebuttal.

5. Section 868, subdivision 2, L. O. L., provides that the jury are not bound to find against a presumption or other evidence satisfying their minds, and Portland City Charter, Section 404, provides that in any suit assessment proceedings shall be presumed to be regular until the contrary is shown. In a suit to cancel an assessment of real property and to enjoin its sale where the defendant relied on the presumption of regularity, the affidavit of the posting of the notices of the proposed improvement, received in evidence, was defective. *Held*, that a presumption cannot contradict facts or overcome facts proved; that the affidavit overcame the presumption that official duty had been regularly performed, and imposed upon the defendant the duty of introducing in evidence another affidavit regular in form, showing the posting of the notices as required, or to substantiate the loss of such proof in the manner prescribed by law. (*Hancock Land Co. v. Portland*, 85.)

Evidence—Burden of Proof—Party Having Peculiar Knowledge.

6. When a fact is peculiarly within the knowledge of a party, he must, if necessary, furnish the evidence thereof. (*Sorenson v. Kribs*, 130.)

Evidence—Parol Evidence—Failure of Consideration—Conditional Delivery.

7. The rule that parol evidence cannot be introduced to contradict or vary the terms of a written instrument excludes all evidence between the maker and payee of the note that the liability of the former should be conditional, unless the condition affects the consideration, so that as a result of its failure there is a total or partial failure of consideration. (*Colvin v. Goff*, 314.)

Evidence—Parol Evidence—Failure of Consideration—Advances of Money.

8. Where one of several defendants jointly indicted for a crime, who had been acquitted, advanced to another, who had been convicted,

money to enable the latter to prosecute his appeal, taking a note therefor, parol evidence is not admissible to show an agreement that the makers should be liable on the note only in case the conviction was reversed, since that condition did not affect the consideration for the note, and, if considered as a collateral contract, was void for want of consideration. (*Colvin v. Goff*, 314.)

Evidence—Self-serving Declarations—Voluntary Conveyance.

9. In a suit to set aside a debtor's voluntary conveyance to his wife, her declarations to the scrivener who prepared the deed that her husband had wasted considerable money in drinking, that his health was poor, and that she took the conveyance to obviate the expense of administration of his estate were self-serving, and could not alter the effect imputed by law to the conveyance. (*Hillsboro Nat. Bank v. Garbarino*, 405.)

Evidence—Judicial Notice—Statutes of Another State.

10. The Supreme Court will not take judicial notice of the statutes of another state. (*Rainey v. Rudd*, 461.)

Evidence—Presumption—Statutes of Another State.

11. Where the statutes of another state are not pleaded, it will be presumed that upon the questions involved the common law prevails. (*Rainey v. Rudd*, 461.)

Evidence—Written Contract—Parol Evidence.

12. In action by attorneys for compensation under a written agreement, it was proper to exclude testimony relating to the amount of the fee, when it was payable, and from what sources the money was to be derived, as to which items the agreement was complete in itself. (*Snow v. Beard*, 518.)

Evidence—Opinion Evidence—Conclusion of Witness.

13. In action by attorney for agreed compensation, a defense being that the attorney had refused to go on with the employment at one time, which defense was answered by showing that the attorney did later in fact go on with the trial, testimony of defendant that the attorney's refusal to proceed with the case was final was mere conjecture amounting to a conclusion, which could properly be stricken out. (*Snow v. Beard*, 518.)

See Appeal and Error, 3, 11, 15, 18.

See Attorney and Client, 6.

See Bills and Notes, 7, 8.

See Boundaries, 2, 3.

See Carriers, 1, 6.

See Contracts, 4.

See Criminal Law, 2-5, 8, 13, 14, 17, 18, 20, 22, 23.

See Dedication, 1.

See Divorce, 3.

See Electricity, 2.

See Fraudulent Conveyances, 3.

See Gifts, 1.

See Homicide, 6-10.

See Larceny, 1, 2.

See Master and Servant, 2.
 See New Trial, 1.
 See Railroads, 1.
 See Reformation of Instruments, 1-3.
 See Schools and School Districts, 4.
 See Specific Performance, 3.
 See Tenancy in Common, 1.
 See Waters and Watercourses, 2, 6.
 See Witnesses, 1, 2.

EXCEPTIONS.

Preservation of Exceptions.

See Appeal and Error, 19.

EXCEPTIONS, BILL OF.

See Appeal and Error, 25.

EXECUTION.

Execution—Injunction—Judgment Against Another.

1. The owner of real property has the right to restrain the sale thereof under a judgment against a third party, for the payment of which the owner of such realty is not liable. (*Lieblin v. Breyman Leather Co.*, 22.)

Execution—Joint and Several Note—Judgment—Satisfaction.

2. A judgment against joint and several promisors does not give the judgment creditor any rights for the collection of the debt not possessed by the owner of the judgment against persons who are merely joint debtors, and who have been served with summons, though the judgment debtor may seize the property of all or the property of each if he chooses, and is not obliged to look to one before he calls upon the other for payment. (*Anderson v. Stayton State Bank*, 357.)

Execution—Joint Note—Judgment—Satisfaction.

3. Where all the promisors on a joint obligation are served with summons and a judgment secured against them, the judgment creditor is not obliged to exhaust the joint property before seizing the separate property of the individual promisors, because he may do so as he chooses, since a joint obligor is liable *in solido* for the whole debt. (*Anderson v. Stayton State Bank*, 357.)

Execution—Judgment—Joint Obligors—Satisfaction—Statutes.

4. Under Section 61, L. O. L., prescribing how the plaintiff may proceed when the action is against two or more defendants when a summons is served upon one or more, but not all of them; Section 181 providing for judgment against one or more of several defendants, and Section 188 providing for judgment against several defendants on the confession of one, plaintiff, though service cannot be obtained on all those jointly liable on a contract, may have judgment against all, and may satisfy it with the joint property of all the promisors, or the individual property of the several promisors who have been served with summons, and is not obliged to exhaust the joint property before call-

ing upon the separate estates for payment. (*Anderson v. Stayton State Bank*, 357.)

EXECUTORS AND ADMINISTRATORS.

Executors and Administrators—Sale of Realty—Procedure—Directions for Sale.

1. Under Section 1263, L. O. L., providing that, when a testator shall provide in his will for the sale of his estate, it may be sold as directed by the executor without an order of the court, an executrix given by the will a power of sale, accompanied by a command to execute it, can sell the realty without taking the preliminary steps required by Sections 1248, 1253-1255, L. O. L., or obtaining the order for sale required by Section 1256. (*Jones v. Ross*, 706.)

Executors and Administrators—Sale of Realty—Direction for Sale—Publication of Notice.

2. Where a will gave an executrix a naked power to sell the real estate and commanded her to exercise that power, but gave no directions as to the manner and terms of sale, the executrix could not, under Section 1263, L. O. L., providing that, when a testator makes provision in his will for the sale of his estate, it may be sold as directed by the executor without an order of the court, but that he shall be bound to conduct the same and make return thereof in all respects as if made by order of the court, unless there are special directions in the will concerning the manner and terms of sale, in which case he shall be governed by such directions, give a binding option to sell without giving the notice of sale required by Section 1257. (*Jones v. Ross*, 706.)

Executors and Administrators—Sale of Realty—Power—Trust.

3. The powers of an executrix who was given by the will a naked power to sell real estate differ from those of a testamentary trustee to whom the land was devised with directions to sell to carry out the trust, and who is usually free from the statutory limitations imposed on executors and administrators. (*Jones v. Ross*, 706.)

EXPERTS.

See Criminal Law, 24, 25.

FINDINGS.

See Master and Servant, 1

See Trial, 8.

FIRE.

See Railroads, 1-4.

See Trial, 6.

FORECLOSURE.

See Chattel Mortgages, 1.

See Corporations, 1.

See Mortgages, 1-4.

See Venue, 2.

FRAUD.

See Judgment, 1, 2.

FRAUDS, STATUTE OF.

See Statute of Frauds.

FRAUDULENT CONVEYANCES.**Fraudulent Conveyances—Conveyance to Wife—Presumption and Burden of Proof.**

1. A husband's conveyance to his wife is presumptively fraudulent as against his existing creditors, and the wife has the burden of proving that it was made for a valuable consideration, in good faith, and without intent to defraud such creditors. (*Hillsboro Nat. Bank v. Garbarino*, 405.)

Fraudulent Conveyances—Remedies of Creditors—Indebtedness—Statute.

2. Section 7397, L. O. L., providing that every conveyance of lands with intent to hinder, delay or defraud creditors, etc., as against such creditors shall be void, is in favor of all creditors, and not of any particular class of creditors, so that there is no distinction between creditors whose claims are due and those whose claims are not due. (*Hillsboro Nat. Bank v. Garbarino*, 405.)

Fraudulent Conveyances—Conveyance to Wife—Indebtedness—Evidence.

3. In a judgment creditor's suit to set aside a husband's voluntary conveyance to his wife, she is not estopped to go behind the judgment and inquire whether there was any actual indebtedness, and, estoppels being mutual, the creditor may show that the husband borrowed money from him and had not repaid it. (*Hillsboro Nat. Bank v. Garbarino*, 405.)

Fraudulent Conveyances—Burden of Proof.

4. Where a debtor conveys substantially all his estate to a near relative, ostensibly to satisfy his debt to the latter, in a suit by creditors to set aside a deed for fraud, the grantee must establish clearly that there was a valuable consideration therefor. (*First Nat. Bank v. Courtright*, 490.)

GARNISHMENT.**Garnishment—Property Assigned.**

1. After notice of an assignment of a specific fund is brought home to the debtor, the debt is not subject to garnishment by creditors of the assignor. (*Morris v. Leach*, 509.)

GIFTS.**Gifts—Evidence—Parol Gift of Land.**

1. Evidence in a suit to quiet title *held* sufficient to support a finding that plaintiff's father made a parol gift of the land in question to his daughter during his lifetime. (*Parker v. Kelsey*, 384.)

Gifts—Parol Gift of Land—Statutes.

2. Under Section 804, L. O. L., providing that interests in land cannot be created or transferred except by operation of law, or by an instrument in writing, a mere parol gift of realty will not of itself pass title. (*Parker v. Kelsey*, 384.)

HARMLESS ERROR.

See Appeal and Error, 14, 20, 22.

See Criminal Law, 1.

See Homicide, 5, 11.

HIGH SCHOOLS.

See Schools and School Districts, 5.

HIGHWAYS.

See Municipal Corporations, 8.

HOLDER IN DUE COURSE.

See Bills and Notes, 2.

HOMICIDE.

Homicide—Statute—Abortion.

1. The Oregon statute, making homicide from unlawful abortion manslaughter, has not created a new crime, but merely reduced the grade of the offense at common law by changing the punishment from death to imprisonment in the penitentiary. (*State v. Farnam*, 211.)

Homicide—Indictment—Abortion.

2. An indictment for murder in the first degree is sufficient to sustain a conviction for homicide, committed in an attempt to procure an abortion. (*State v. Farnam*, 211.)

Homicide—Indictment—Unknown Means.

3. An indictment for murder by means unknown to the grand jury is good. (*State v. Farnam*, 211.)

Homicide—Indictment—Proof and Variance.

4. An indictment for murder by means unknown to the grand jury will sustain conviction in a case where accused was conclusively proved to have either murdered a girl outright or killed her in an attempt to procure an abortion. (*State v. Farnam*, 211.)

Homicide—Harmless Error.

5. Where it appeared that accused either killed a girl outright or in an attempt to procure an abortion, but there was no evidence that an operation was necessary to preserve the life of the mother or child, any error in failing to point out the statutory exceptions or justification for such an operation was harmless. (*State v. Farnam*, 211.)

Homicide—Evidence.

6. Evidence of the identity of deceased, whose remains were found burned in a barn, of previous preparation by accused for abortion,

and of footprints of accused and the horse he was riding, etc., *held* to sustain a conviction for manslaughter by direct killing or producing an abortion on deceased. (State v. Farnam, 211.)

Homicide—Evidence—Declarations of Deceased.

7. Declarations of deceased, made in a perfectly natural manner, on the evening of the homicide, that she was about to meet accused were admissible to show that what she intended to do was probably done, and did not violate Section 705 or Section 727, subdivision 4, L. O. L., as to declarations, or any other Code section. (State v. Farnam, 211.)

Homicide—Evidence—Admissibility.

8. Testimony of witness as to a comparison of a hair-rat found in the vicinity of the body with those found by them at the house of a codefendant, wife of deceased, was properly permitted when the witnesses testified that the "rats" submitted in court were not the ones compared by them at the home of the codefendant. (State v. Branson, 377.)

Homicide—Evidence—Admissibility.

9. Evidence that defendant had been seen talking to a codefendant, wife of deceased, on numerous occasions in front of her home, when her husband was absent, and that she had been seen standing on the bank of the river 100 yards from the bridge on which defendant was standing, was admissible, as going directly to the conduct of the defendant. (State v. Branson, 377.)

Homicide—Evidence—Admissibility.

10. Evidence of comparison made between woman's tracks found at the scene of the homicide with shoes worn by codefendant, wife of deceased, was properly admitted, where the shoes compared were not in court. (State v. Branson, 377.)

Homicide—Appeal—Harmless Error—Instruction.

11. Such instruction was prejudicial to defendant. (State v. Booth, 394.)

See Indictment and Information, 1.

HUSBAND AND WIFE.

Husband and Wife—Contracts—Signing of Wife's Name.

1. Where a husband without authority signed his wife's name to an agreement to pay brokerage fees, the wife is not liable for such fees. (Hewey v. Andrews, 448.)

See Evidence, 9.

See Fraudulent Conveyances, 1-3.

IMPEACHMENT.

See Witnesses, 1, 2.

IMPROVEMENTS.

See Partition, 1, 2.

INDEBTEDNESS.

See Fraudulent Conveyances, 2, 3.

INDICTMENT.

Indictment and Information—Homicide—Included Offenses.

1. The general rule is that an indictment for murder in the first degree necessarily involves all other grades of homicide which the evidence tends to establish. (State v. Farnam, 211.)

See Criminal Law, 7.

See Homicide, 2-4.

INDORSEMENT.

See Bills and Notes, 1-4, 12.

INFANTS.

Infants—Offenses Against Soliciting—"Procure"—"Solicit"—"Entice."

1. Within Section 2078, L. O. L., defining the crime of soliciting, procuring, or enticing a child under 18 years to have sexual intercourse, the words "procure," "solicit," and "entice" each import an initial, active and wrongful effort. (State v. Norris, 680.)

INITIATIVE AND REFERENDUM.

See Constitutional Law, 6, 7.

See Municipal Corporations, 11, 14.

INJUNCTION.

See Execution, 1.

See Waters and Watercourses, 5, 6.

INSANE PERSONS.

Insane Persons—Service of Summons—Statute—Construction.

1. Under Section 55, subdivision 4, L. O. L., providing that in the case of a person judicially declared to be of unsound mind and for whom a guardian has been appointed summons shall be served by delivering a copy, with a certified copy of the complaint, to such guardian and to the defendant personally, service only upon a defendant, who had been adjudged insane and for whom a guardian had been appointed, was not sufficient. (Lieblin v. Breymann Leather Co., 22.)

INSTRUCTIONS.

See Appeal and Error, 7-9, 20.

See Attorney and Client, 7-9.

See Bills and Notes, 13.

See Criminal Law, 10, 11, 13, 21.

See Homicide, 12.

See Railroads, 2, 3.

See Trial 1-7, 9, 11-13.

INTENT.

See Dedication, 2.

See Statutes, 1.

INTEREST.**Interest—Computation—Partial Payments.**

1. The rule for casting interest, where partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on a balance of principal remaining due. If the payment be less than the interest, the surplus of the interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied toward discharging the principal, and interest is to be computed on the balance as aforesaid. (*First Nat. Bank v. Courtright*, 490.)

When not Chargeable Against Property Owners.

See Municipal Corporations, 1, 2.

IRRIGATION.

See Waters and Watercourses, 1-4.

JOINT ADVENTURES.**Joint Adventures—Joint Contracts—Extension of Time.**

1. In joint contracts neither party can extend the time for performance without the consent of the other. (*Short v. Rogue River Irr. Co.*, 662.)

Joint Adventures—Joint Vendors—Extension of Time.

2. One joint vendor cannot extend time of performance without consent of other. (*Short v. Rogue River Irr. Co.*, 662.)

JOINT AND SEVERAL LIABILITY.

See Action, 1.

JOINT AND SEVERAL NOTE.

See Bills and Notes, 19, 20.

See Contracts, 1.

See Execution, 2.

See Partnership, 1.

JOINT NOTE.

See Bills and Notes, 18.

See Contracts, 2.

See Execution, 3, 4.

See Partnership, 2.

JUDGMENT.

Judgment—Action to Vacate—Grounds—Fraud.

1. Where a trial court had jurisdiction to render a judgment, in order to assail it, although irregular or voidable, it would be necessary to allege that there was fraud or unfairness in the obtainment thereof. (Lieblin v. Breyman Leather Co., 22.)

Judgment—Action to Vacate—Nature—"Direct Attack."

2. A suit to cancel a judgment and to enjoin the enforcement thereof by execution against land of which plaintiff claims to be owner is a direct, and not a collateral, attack upon the original judgment. (Lieblin v. Breyman Leather Co., 22.)

Judgment—Setting Aside—Call of Causes—Notice.

3. Since Section 2804, L. O. L., as amended in 1911 (Laws 1911, p. 440), provides that there shall be two terms of the Circuit Court in Lincoln County, one beginning on the first Monday in August, counsel employed in a case in such county is chargeable with notice of such legislation, and the fact that the Circuit Court in his own county was not in session did not justify his assuming that a case on the docket in Lincoln County would not be heard at the August term. (Paabo v. Hanson, 512.)

Judgment—Setting Aside—Grounds.

4. Where the judgment appealed from was obtained *ex parte* after notice that the other party could not appear for sufficient reasons, it will be reversed on terms, under Section 103, L. O. L., providing that the court may, in its discretion, relieve a party from a judgment by surprise or excusable neglect. (Paabo v. Hanson, 512.)

Judgment—Persons Concluded—Municipalities.

5. A judgment for or against a municipal corporation in a suit concerning a matter of general interest is binding, not only on the municipality and its officers, but also upon citizens or taxpayers in so far as it concerns their interests as members of the general public, and a judgment between certain residents or taxpayers and a municipality may be conclusive on all other citizens similarly situated. (Rose v. Port of Portland, 541.)

Judgment—Conclusiveness—Appellate Court.

6. The decision of an appellate court is conclusive upon the parties as to the matter adjudged in subsequent litigation between them in the same or any other court, and this is true even though the appellate court has since decided differently in other cases. (Rose v. Port of Portland, 541.)

Judgment—Pleading—Necessity.

7. Estoppel by a former decree is an affirmative defense which must be pleaded in order to be available. (McCully v. Heavens, 650.)

See Contracts, 2.

See Execution, 1-4.

See Pleading, 1.

Appeal from Part of a Judgment.

See Appeal and Error, 1.

Increasing Judgment from Undisputed Evidence.

See Appeal and Error, 11.

JUDICIAL NOTICE.

See Criminal Law, 22.

See Evidence, 10.

JURISDICTION.

See Courts, 1, 2.

Of Subject Matter cannot be Waived.

See Criminal Law, 6.

Jurisdiction of Appellate Court.

See Appeal and Error, 16.

JUSTICES OF THE PEACE.

See Criminal Law, 6.

KNOWLEDGE.

See Evidence, 6.

See Mechanics' Liens, 2.

LANDLORD AND TENANT.**Landlord and Tenant—Lessees—Assignees.**

1. Under Section 705, L. O. L., declaring that the rights of a party cannot be prejudiced by the declaration, act or omission of another except by virtue of a particular relation between them, lessees cannot be held to have exercised an option to extend a lease by reason of the acts of their alleged assignee, where the assignment was not established. (Toomey v. Casey, 71.)

Landlord and Tenant—Subletting—Effect.

2. Where lessees sublet premises under an instrument giving the sublessee the right to hold over for an extended period, in case the lessees should exercise their option to extend the lease, the sublessee cannot exercise the option and bind the lessees for the period of the extension. (Toomey v. Casey, 71.)

Landlord and Tenant—Construction of Lease—Furnishing Seed.

3. In a written lease of wheat land for five years which provided that one half thereof should be put in crop each year, and the other half left fallow, a provision that the lessee should cultivate and summer-fallow the lands each year, and would summer-fallow it for the last year, the work to be done in a husband-like manner, and would furnish all seed necessary to sow the same, will not be construed to require the lessee to furnish the seed necessary to sow the part left fallow during the last year, from the crop on which he would get no benefit, but only that he would furnish the seed for the crop

raised during the five years, of which he was to receive two thirds and the lessor one third. (*Bott v. Campbell*, 468.)

LARCENY.

Larceny—Evidence—Admissibility.

1. In a prosecution for larceny of two horses from the range, testimony of a witness that he had seen an unbranded horse which the prosecutor claimed which answered generally to the description of one of the horses in question, and that later he had seen the same horse in the defendant's field with defendant's brand upon its left shoulder, was competent to show the acts of ownership exercised by the prosecutor over the animal mentioned from which the presumption might arise that it was his property. (*State v. McLennan*, 621.)

Larceny—Evidence—Admissibility.

2. The evidence was also admissible to show that the property was afterward found in the possession of the defendant, because it was in his pasture with his brand upon it. (*State v. McLennan*, 621.)

LEASE.

See Landlord and Tenant, 1, 2.

Construction as to Furnishing Seed.

See Landlord and Tenant, 3.

Improvements of Leased Premises by Lessee.

See Mechanics' Liens, 1-7.

LEGATHE.

Liability for Debts of Decedent.

See Wills, 1-3.

LIENS.

See Attorney and Client, 5.

See Mechanics' Liens.

See Venue, 2.

LIMITATION OF ACTIONS.

Limitation of Actions—Statute of Limitations—Six-year Claim.

1. In an action between cotenants to set aside a decree affecting plaintiff, and to partition real property, where defendants claimed for half the taxes admitted to have been paid by them, the allowance, as an offset to plaintiff, of half the sum of \$250 expended by her in securing patent for the land more than six years before, was error; the statute of limitations as to such claims having run before suit was instituted. (*St. Martin v. Hendershott*, 58.)

LIVESTOCK.

See Carriers, 1-3.

MANDAMUS.

Mandamus—Subjects of Relief—Change of Venue.

1. Section 2432, L. O. L., providing that the justice of the peace may change the place of trial when it appears from the affidavit of a

party that the justice is so prejudiced against the party making the motion that he cannot expect an impartial trial before such justice, does not require a justice of the peace to grant a change of venue upon the mere assertion of the party that the justice is prejudiced, and therefore an alternative writ of *mandamus* to compel a justice of the peace to grant a change of venue, which contains no showing as to prejudice, except the conclusion of the party applying for the change, must be quashed under Section 613, L. O. L., authorizing *mandamus* to require action by an inferior court in the discharge of its functions, but not to control judicial discretion. (*Best v. Parkes*, 171.)

Mandamus—Officers—Duties and Liabilities—Clerk.

2. Under Laws of 1915, Chapter 62, directing that a county clerk be given credit for certain funds lost by his predecessor, and directing the clerk to return such funds to the parties entitled thereto, the clerk cannot comply with the latter requirement, without rendering himself liable, until the money collected is delivered to him, and, no express provision having been made therefor by said act, *mandamus* will not lie to compel the county commissioners to deliver the funds raised by taxation to the county clerk. (*State ex rel. v. Multnomah County*, 428.)

Mandamus—Grounds—Freedom of Question from Doubt.

3. *Mandamus* will not lie unless the ministerial duty imposed by law is free from doubt. (*State ex rel. v. Multnomah County*, 428.)

MASTER AND SERVANT.

Master and Servant—Verdict—Implied Findings.

1. In a servant's action for injuries alleged by defendant to have been caused by the negligence of a fellow-servant, a verdict for the plaintiff implies that the jury found that the injury was caused by defendant's negligence and not that of the fellow-servant. (*Barnhart v. North Pacific Lumber Co.*, 657.)

Master and Servant—Evidence—Sufficiency.

2. In a servant's action for injuries, evidence held sufficient to take plaintiff's contention as to the cause of his injury to the jury. (*Barnhart v. North Pacific Lumber Co.*, 657.)

MECHANICS' LIENS.

Mechanics' Liens—Right to Lien—Contract With Lessee—"Agent"—Statute.

1. Under Section 7416, L. O. L., conditioning the right to a mechanic's lien upon the labor and material being furnished at the instance of the owner or his agent, a lessee under a lease providing, as a part consideration thereof, that he should make permanent improvements which should revert to and become the property of the lessor, and who causes such improvements to be made, becomes the "agent" of the lessor. (*Myers v. Strowbridge Estate Co.*, 29.)

Mechanics' Liens—Waiver—Knowledge—Provision in Original Contract.

2. Where the owner and lessor made his lessee an agent to make improvements on the leased premises, a stipulation in the agent's

contract that the owner and lessor should not be responsible for any bills contracted in the improvement was not binding upon a subcontractor, unless he assented or agreed to be bound thereby; and the subcontractor's knowledge alone of the original contractor's waiver of his lien did not constitute a waiver of the subcontractor's lien. (*Myers v. Strowbridge Estate Co.*, 29.)

Mechanics' Liens—Persons Liable—Owner—Notice Denying Liability.

3. Under Section 7419, L. O. L., providing that every building constructed on land with the knowledge of the owner shall be held to have been constructed at his instance and shall be subject to liens, unless within three days after knowledge of such construction he post a notice that he will not be responsible therefor, premises leased for a term and under which the lessee became the owner's agent and contractor for its improvement were subject to the liens of subcontractors, notwithstanding the posting of such notice. (*Myers v. Strowbridge Estate Co.*, 29.)

Mechanics' Liens—Improvements of Leased Premises—Owner's Notice of Nonliability—Effect.

4. Under such provision and Section 7416, L. O. L., giving a lien to every person performing labor upon or furnishing material used in the construction of any building at the instance of the owner or his agent, and making every contractor an agent for the owner, and Section 7417, imposing such lien upon the land if it belongs to the person who caused the improvements, the posting of notices by the owner and lessor that it would not be responsible for the payment for labor or materials furnished for improvements made by its lessee, as agent or contractor, would not affect the matter of the waiver of the subcontractors' liens, or prevent a lien upon the improved building, or even inform them that the lessee, as contractor, had stipulated that no lien should attach to the premises. (*Myers v. Strowbridge Estate Co.*, 29.)

Mechanics' Liens—Plans and Specifications—Reference—Effect.

5. Where a lessee, as the owner's agent and contractor, employed an architect to prepare plans and specifications for the improvement of the leased premises, and in the heading on the first page the building was described as owned by the lessor, and on the first page of the specifications there was a provision inserted at the lessor's request that he would not be responsible for any bills contracted in the improvement therein specified, and where the two pages of the specifications relating to subcontractor's work were detached from the remainder and given to and signed by them without directing their attention to the provision that the owner and lessor should not be responsible, etc., the reference could serve only the purpose of furnishing the plans and specifications for the work, under the rule that where reference is made in one document to another unattached document for a specific purpose only, such other document becomes a part of the former for such purpose only. (*Myers v. Strowbridge Estate Co.*, 29.)

Mechanics' Liens—Original Contractors—Waiver—Subcontractors—Effect.

6. In view of the statute giving a direct lien to persons furnishing labor and material in the alteration of a building, upon the estate

of the person causing the alteration to be made, as a privilege or right for their protection, based on the theory of having added to the value of the estate with the consent of the owner, the fact that the original contractor has agreed with the owner to protect him against liens is not an agreement on the part of subcontractors that they will look exclusively to the original contractor and not to the property for their compensation, as in such case there is no meeting of the minds of the contracting parties to that effect. (*Myers v. Strowbridge Estate Co.*, 29.)

Mechanics' Liens—Subcontractors—Waiver.

7. The agreement of subcontractors to accept a part of their compensation in the preferred stock of the lessee, the owner's agent and contractor, did not amount to a waiver of their right to a lien to that extent, where the stock was never delivered or tendered as security or payment. (*Myers v. Strowbridge Estate Co.*, 29.)

MEETING OF MINDS.

See Reformation of Instruments, 2.

MISJOINDER.

Of Parties Plaintiff.

See Waters and Watercourses, 4.

MISTAKE.

See Reformation of Instruments, 1-3.

MODIFICATION.

See Contracts, 3.

MORTGAGES.

Mortgages—Foreclosure—Purchase by Mortgagee—Title.

1. A mortgagee, purchasing at a sheriff's sale with knowledge of plaintiff's prior equity in land as purchaser in possession under an oral agreement with the mortgagor, acquired no greater estate than the mortgagor held. (*Skinner v. Furnas*, 414.)

Mortgages—Trust Deed.

2. Where land is transferred to a trustee to secure a loan from a bank, it is to be treated as a mortgage, and foreclosed only in the statutory manner. (*First Nat. Bank v. Courtright*, 490.)

Mortgages—Duty of Trustee Under Trust Deed—Foreclosure.

3. The *cestui* may call upon the trustee to foreclose such mortgage by appropriate legal proceedings, and apply the proceeds to the debt, or the judgment in which the debt has been merged. (*First Nat. Bank v. Courtright*, 490.)

Mortgages—Form of Decree.

4. In a creditors' suit, in which plaintiff was the *cestui* of a deed securing its loan, and the trustee of such trust and the debtor and others were defendants, the complaint asking for decree requiring the trustee to "sell and dispose" of the property held by him as

trustee, a decree would be entered merely directing the trustee to foreclose the mortgage by appropriate proceedings, although the plaintiff conceded that it did not seek to obtain strict or ordinary foreclosure of the conveyance, since, in any event, a decree directing the trustee to sell and dispose of the land would not empower a sale without suit to foreclose the mortgage. (*First Nat. Bank v. Court-right*, 490.)

See Dower, 1.

MOTOR VEHICLES.

See Municipal Corporations, 6, 7.

MUNICIPAL CORPORATIONS.

Municipal Corporations—Assessment for Public Improvements—Extras.

1. Under a city charter authorizing the council to levy an assessment on lands specially benefited to pay the whole or any part of the expense of a public improvement, but making no specific provision for assessment to pay the incidental expenses of such improvement, the amount paid the city engineer for superintendence and the amount paid for the abstract of the property owners and the clerical work of preparing the assessment cannot be included in the assessment for the improvement. (*Giles v. Roseburg*, 67.)

Municipal Corporations—Assessment for Public Improvements—Interest.

2. Under a city charter providing that all general or special taxes levied for public improvements should bear interest at the legal rate from the time they are delinquent, the interest on warrants drawn in favor of contractors for a public improvement from the date of such warrants until the assessment was levied and the lien attached is not chargeable against the property owners. (*Giles v. Roseburg*, 67.)

Municipal Corporations—Presumption as to Assessment for Street Improvements—Extending Time for Work.

3. The charter of Portland, declaring that an assessment for street improvement, and everything connected therewith, shall be presumed regular till the contrary is shown, and that the executive board shall fix the time in which an improvement shall be completed and may extend it if the circumstances warrant, an assessment cannot be held void, merely because the work was completed four days after the time limited, there being no evidence that the executive board, which accepted the improvement, did not seasonably extend the time, which it could do on its motion, though it appears that the city council attempted to extend the time after completion of the work. (*Cormack v. Cormack*, 108.)

Municipal Corporations—Legislative Control—Home Rule Charter.

4. Article XI, Section 2, of the Constitution, providing that the legal voters of every city and town are granted power to enact and amend their municipal charter subject to the Constitution and criminal laws of the State of Oregon, and forbidding the legislative assembly to amend or repeal any charter for any municipality, etc., does not extend the authority of such municipalities over subjects not prop-

erly municipal and germane to the purposes for which municipal corporations are formed. (*Woodburn v. Public Service Commission*, 114.)

Municipal Corporations—Regulation of Rates.

5. The right to regulate rates is a matter of general concern, and does not pertain solely to municipal affairs. (*Woodburn v. Public Service Commission*, 114.)

Municipal Corporations—Streets—Injuries to Persons upon—Speed of Motor Vehicles.

6. Under Motor Vehicle Law (Laws 1911, pp. 266, 267), Section 2, subdivisions 11 and 17, declaring that in passing railroad or street-cars motor vehicles shall be operated upon that side of the street or railroad car with due care and caution for the safety of passengers alighting or decending, but should there be on the left side of the street or railroad car a clear space, motor vehicles shall be permitted to so increase their speed for the necessary distance to negotiate a safe clearance between the street or railroad car and the vehicle desiring to pass, which such speed shall not be deemed excessive, having due regard to the speed of the railroad or street-car, and that the speed on all streets and highways shall be a reasonable speed up to and not exceeding 25 miles an hour, but any speed beyond that shall be unreasonable, it is not negligent for a motorist in passing a street-car where there is a clearance to drive his car at any necessary speed up to 25 miles an hour. (*Sorsby v. Benninghoven*, 345.)

Municipal Corporations—Injuries to Persons on Streets—Negligence.

7. A motorist for the purpose of passing a street-car increased the speed of his vehicle so that he was proceeding at a speed estimated as high as 18 miles an hour. The street was clear, and he could not see a young child standing behind a telegraph pole. Just as he was abreast the child it ran out and was struck by the rear fender, the motorist turning his vehicle into the car to escape an accident. *Held*, that the motorist was not liable for the resultant death of the child; for he was not driving at an excessive speed, but was lawfully proceeding in accordance with the express permission given by statute. (*Sorsby v. Benninghoven*, 345.)

Municipal Corporations—County Roads—Control—Statute.

8. The control of county roads is primarily in the legislative power of the state, and until in plain terms the state has given control thereof to any municipality, the latter cannot assume or exercise authority over them; and, under its act of incorporation, Laws of 1891, page 505, Section 39, by subdivision 14 defining the authority of the board of trustees as to obstructions in streets, by subdivision 28 authorizing it to construct streets, by subdivision 32 authorizing county road supervisors to collect taxes and keep the county roads in repair, etc., by Section 68 authorizing the board of trustees to change the grade and improve any street, and by Section 101 authorizing the laying out of streets, etc., the City of Bandon had no authority to exercise control over a county road. (*Christie v. Bandon*, 481.)

Municipal Corporations—Public Improvements—Remonstrance—Sufficiency.

9. A tract of land owned by an individual, but divided in the center by a fence parallel to the street to be paved, which separated

the cultivated portion from the pasture land, which tract has been all assessed for the pavement, is to be counted as one entire tract in estimating the area of land owned by those remonstrating against the improvement under a charter providing that, if the owner or owners of two thirds of the property adjacent to a street filed a written remonstrance against the proposed improvement, it shall not be proceeded with. (*Lais v. Silverton*, 503.)

Municipal Corporations—Powers—Construction.

10. To the extent that attributes of sovereignty are granted to local subdivisions, the language carrying the grant should be strictly construed, as such grant is a limitation upon the power of legislation. (*Rose v. Port of Portland*, 541.)

Municipal Corporations—Port—Initiative Amendment of Charter—Constitutional and Statutory Provisions.

11. Laws of 1901, page 417 (Sections 6076-6105, L. O. L.), revising all previous legislation as to the creation of the Port of Portland as a municipal corporation by Section 6078, empowers the port to improve the harbor in the Willamette River "at the City of Portland," and by Section 6079 empowers it to control the river in the harbor "at the City of Portland," and further grants the right to make regulations for the navigation "of said harbor in said City of Portland"; and in 1912 the legal voters of the port, acting on an initiative petition, attempted to amend their charter by including the power to dredge a slough in the Columbia River within the port, but outside the city limits. Article XI, Section 2, of the Constitution as amended and adopted in 1906, provides that corporations may be formed under general laws, but shall not be created by special laws, and that the legislative assembly shall not enact or amend any charter for any municipality, city or town, and grants the legal voters of every city and town power to amend their municipal charter, and Article IV, Section 1a, of the Constitution as amended and adopted at the same time, provides that the initiative and referendum powers reserved by the Constitution shall be reserved to the legal voters of every municipality and district as to all the special and municipal legislation, and that the manner of exercising such powers shall be prescribed by general laws, except that cities and towns may provide the manner of exercising such powers as to their municipal legislation, and Article IV, Section 1 of the Constitution as amended and adopted in 1902, declares that the legislative authority of the state shall be vested in a legislative assembly, and reserves to the people power to propose laws and constitutional amendments and to enact them at the polls, and reserves power to approve or reject legislative acts. *Held* that charters or laws, granting or enumerating the powers exercisable by a corporation, are indispensable, and that while cities and towns can enact or amend their own charters, no other corporation, such as a port, can, without an enabling act, legislate power unto itself to legislate, so as to amend its charter or act of incorporation. (*Rose v. Port of Portland*, 541.)

Municipal Corporations—Statutes—Port—Amendment of Charter—Legislative Power—"Referendum"—"Any."

12. Article IV, Section 1a, of the Constitution as amended and adopted in 1906, provides that the initiative and referendum powers reserved to the people by the Constitution shall be further reserved

to the legal voters of any municipality and district as to all special and municipal legislation; that the manner of exercising such powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation, and Article XI, Section 2, of the Constitution as amended and adopted in 1906, provides that corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws, and that the assembly shall not enact or amend any charter or act of incorporation for any municipality, city or town, and that the legal voters of every city and town may enact or amend their municipal charter subject to the Constitution. *Held*, that the word "referendum" of itself implies the existence of a law-making body other than the legal voters; that the word "any" may sometimes signify "every" or "all," but primarily means one individually out of a number, and is a derivative of one signifying an indeterminate unit, or number of units out of many or all; and that, in view of the history and purpose of the amendment, the legislative assembly, while it cannot enact a special measure, amending a city or town charter, may enact a special law, amending the charter or act of incorporation of a municipality other than a city or town, such as a port, and that if the assembly passes a special measure for a municipality other than a city or town, its legal voters can apply the referendum to that measure. (*Rose v. Port of Portland*, 541.)

Municipal Corporations—Port—Powers—Coaling Ships—Statutes.

13. Laws of 1901, page 417, reproduced in Sections 6076-6105, L. O. L., Revised Laws of 1891, page 791, establishing and incorporating the Port of Portland, and declared the object of the port to be "to promote the maritime shipping and commercial interests of the Port of Portland," provided for the improvement of certain rivers in the port, and between it and the sea, by a ship canal to the sea, and conferred the right of eminent domain, taxation and the right to make regulations, and to own and operate a dry-dock. In 1908 the legal voters initiated and adopted a measure, attempting to confer the additional power of coaling or bunkering ships, under which the port proposed to purchase a site, erect coal-bunkers, and maintain a supply of coal, the expenses of which were to be raised by taxes, to meet the competition of Puget Sound ports, where coal could be obtained for less than in Portland, and thereby overcome such disadvantage and retain and increase its ocean commerce. *Held*, in view of the object of such legislation, that the coaling or bunkering of ships would be incidental to the public purpose for which the port was created, and would be itself a public purpose, which might be conferred by the legislature. (*Stevenson v. Port of Portland*, 576.)

Municipal Corporations—Port—Powers—Amendment to Charter—Coaling Ships.

14. Under Laws of 1901, page 417, reproduced in Sections 6076-6105, L. O. L., revising Laws of 1891, page 791, incorporating the municipality of the Port of Portland without the right to coal ships, the voters thereof could not, without legislative aid, constitutionally initiate and adopt a measure authorizing the port to coal ships. (*Stevenson v. Port of Portland*, 576.)

See Judgment, 5.

See Telegraphs and Telephones, 1.

MUTUALITY.

See Specific Performance, 4.

NEGLIGENCE.

See Bills and Notes, 4.

See Municipal Corporations, 7.

See Railroads, 4.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

New Trial—Newly Discovered Evidence—Effect.

1. In a suit to quiet title, where the weight of the evidence supported plaintiff's contention that he and another agreed upon the line and that a fence was constructed on such line, except where on account of a steep hillside it was necessary to depart from the line, newly discovered evidence that the then wife of such other had heard him say that some day he would have to move the fence out to the line, would not necessarily disprove the existence of the agreement, and hence permission would not be granted to take her testimony. (*McCully v. Heaverne*, 650.)

See Appeal and Error, 24.

NON-NEGOTIABLE INSTRUMENTS.

See Bills and Notes, 14, 15.

NOTICE.

See Bills and Notes, 3.

See Carriers, 3.

See Executors and Administrators, 2.

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See Appeal and Error, 15.

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See Banks and Banking, 1, 2.

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OWNER.

Effect of Owner's Notice of Nonliability.

See Mechanics' Liens, 3, 4.

PAROL AGREEMENT.

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See Appeal and Error, 15.

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PAROL GIFT.

See Adverse Possession, 2.

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PARTIES.

See Carriers, 8.

PARTITION.**Partition—Improvements.**

1. In suit between cotenants to partition real property, plaintiff, who made improvements on the land, building an addition to the house, which was burned, could derive no benefit therefrom. (*St. Martin v. Hendershott*, 58.)

Partition—Improvements.

2. In suit between cotenants to partition the land, no allowance will be made plaintiff for trivial improvements. (*St. Martin v. Hendershott*, 58.)

PARTNERSHIP.**Partnership—Joint and Several Note—Payment—Fund.**

1. The individuals constituting a partnership signing joint and several notes were jointly and severally liable, and the payee might look to their individual assets for payment, or to the partnership estate for payment, where the notes arose out of a partnership indebtedness. (*Anderson v. Stayton State Bank*, 357.)

Partnership—Indebtedness—Payment.

2. A partnership debt is primarily the obligation of the partnership, and secondarily the obligation of the individuals composing it,

and, therefore, the liability of the individual is contingent, and partnership assets must be exhausted before he is obliged to pay out of his own estate. (*Anderson v. Stayton State Bank*, 357.)

Partnership—Joint Note—Liability of Partners and Partnership.

3. Joint notes, on their face purporting to be the obligation not only of a partnership as such, but also of the individual partners whose names appeared thereon with the name of the firm, were intended to give the holder not only the security afforded by the partnership, but the security of the individual signers; the fact that the notes were joint not necessarily implying that they were the debt of none of the signers except the partnership, and the joint notes of the partners for a debt in no way connected with the partnership, not making them a primary claim against the partnership merely because it was joint. (*Anderson v. Stayton State Bank*, 357.)

Partnership—Bills and Notes—Liability—Signature by Trade Name—"Person."

4. Under Section 5851, L. O. L., making one who signs a note in a trade or assumed name liable as if he signed his own name, and Section 6023, defining "person" to include a body of persons, whether incorporated or not, and in view of the fact that a partnership may adopt any name it chooses as its firm name, and that each partner is the agent of the firm and may sign its name to any paper given for partnership business, a note signed, "The Oregon Locators, by F. L. G., member of the firm authorized to sign the firm name," renders the firm and the other member liable. (*Frazier v. Cottrell*, 614.)

See Bankruptcy, 10, 11.

PAYMENT.

See Partnership, 1, 2.

Rule for Computing Interest on Partial Payments.

See Interest, 1.

PERSONAL INJURIES.

See Constitutional Law, 5.

See Electricity, 1-5.

See Municipal Corporations, 6, 7,

PETITION.

See Bankruptcy, 3.

PLEADING.

Pleading—Action to Vacate Judgment—Demurrer.

1. In a suit to cancel a judgment and restrain execution against land of which plaintiff alleged he was the owner, if defendant desired a more detailed statement as to the derivation of plaintiff's title to the land, he should have proceeded by motion, or in some other manner than by demurrer. (*Lieblin v. Breyman Leather Co.*, 22.)

Pleading—Special Demurrer—Statutes.

2. Special demurrers are now abolished; therefore the statute con-templates but one demurrer to a pleading, and any objections not set forth therein are waived, unless they go to the jurisdiction of the

court or to the point that the facts stated do not constitute a crime: Sections 1491, 1499, L. O. L. (State v. Goodall, 329.)

Pleading—Amendment During Trial—Variance.

3. Where defendant, by evident clerical error, failed to deny material allegations, the rule against amendment changing the cause of action does not prevent amendment to enter the denial, especially where both parties went to trial on the theory that such matters were at issue, and plaintiff's only objections were too general to indicate the defect. (Pacific Company v. Cronan, 388.)

Pleading—Amendment During Trial—Variance.

4. The allowance or refusal of an amendment is largely a matter of discretion of the court and depends on circumstances of the particular case. (Pacific Company v. Cronan, 388.)

Pleading—Amendment During Trial.

5. Courts should be liberal in granting amendments pending trial, when it is evident that such course will further justice, particularly in the case of the defendant. (Pacific Company v. Cronan, 388.)

Pleading—Amendment—"Trial"—Statute.

6. Under Section 102, L. O. L., providing that the court may before trial and upon terms allow any pleading to be amended by adding any material allegation, and, at any time before the cause is submitted, may allow the pleading to be amended to correct a mistake, etc., or when the amendment does not substantially change the cause of action, or defense, and Section 113, defining a "trial" as the judicial examination of the issues between the parties, the allowance of an amendment to the complaint before any demurrer had been filed, and before the judicial examination of the issues had begun, was allowed before trial, and hence was admissible, although changing both the cause of suit and the *quantum* of proof required. (Hillsboro Nat. Bank v. Garbarino, 405.)

Pleading—Amendment—Answer.

7. Where defendant deemed himself injured or misled by an amendment to the complaint before trial, he should have taken leave to change his answer to meet the new situation. (Hillsboro Nat. Bank v. Garbarino, 405.)

Pleading—Right of Amendment—Construction.

8. The right of amendment should be liberally construed. (Hillsboro Nat. Bank v. Garbarino, 405.)

Pleading—Insufficiency of Complaint—Cure by Reply.

9. Where the complaint, in a suit for the specific performance of an oral agreement to sell and convey land, did not allege that plaintiff took possession pursuant to any oral contract or otherwise, but the answer averred the entry and possession by complainant's husband without any contract and without the knowledge and consent of defendant mortgagors, and where the demurrer to the complaint was overruled, plaintiff, under a reply traversing the averments of new matter in the answer, might offer evidence to substantiate the issue as to the making of the oral contract for the purchase of the land and

possession and improvements pursuant thereto. (*Skinner v. Furnas*, 414.)

Pleading—Amendment—Complaint—Discretion of Court.

10. The allowance of an amendment to the complaint after the expiration of ten days allowed in which to amend is within the discretion of the trial court. (*McCully v. Heaverne*, 650.)

Pleading—Reply—Departure.

11. In a suit to quiet title, where the complaint in the usual form alleges that plaintiffs are the owners, and the defendant sets up ownership and possession in herself, a reply setting up an agreement as to boundary between plaintiffs and the predecessor in title of defendant settling the title to the land in dispute in plaintiff is not a departure. (*McCully v. Heaverne*, 650.)

See Adverse Possession, 6.
See Appeal and Error, 22, 23.
See Arbitration and Award, 1.
See Attorney and Client, 1.
See Judgment, 7.
See Principal and Agent, 2.
See Specific Performance, 2.
See Tender, 1.
See Waters and Watercourses, 4.
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POLICE POWER.

See Constitutional Law, 1.
See Public Service Commission, 1.

PORT.

See Municipal Corporations, 10-14.

PORT OF PORTLAND, CHARTER OF.

See *Rose v. Port of Portland*, 541.
See *Stevenson v. Port of Portland*, 576.

PORTLAND, CHARTER OF.

See *Hancock Land Co. v. Portland*, 85.
See *Cormack v. Cormack*, 108.

POSSESSION.

See Boundaries, 2.
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PREFERENCES.

See Bankruptcy, 1, 2, 7-9, 12.

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See Bankruptcy, 4.
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 See Evidence, 1, 5.
 See Fraudulent Conveyances, 1.
 See Municipal Corporations, 3.
 See Principal and Agent, 3.
 See Tenancy in Common, 2.

Presumption as to Death from Absence.

See Death, 1.

When Statutes of Another State are not Plead.

See Evidence, 10, 11.

PRINCIPAL AND AGENT.**Principal and Agent—Agent's Authority—Implied Warranty—Damages.**

1. When an agent represents that he is empowered to make a particular contract on behalf of his principal, but in fact has no such authority, the party to whom the representation is made, and who relies thereon and complies with the terms of the supposed agreement, can maintain an action *ex contractu* against the agent, on the implied warranty, to recover the damages sustained. (Sorenson v. Kribs, 130.)

Principal and Agent—Authority of Agent—Action for Damages—Construction of Pleading.

2. Where the complaint alleged that defendant represented his authority to obligate an owner of land to pay a broker's commission to plaintiff's assignor on a sale acceptable to the owner, and that the defendant had no such authority, an answer denying the allegations generally, with an unqualified allegation that defendant employed plaintiff's assignor to sell the land on commission, and not stating that such engagement was made on behalf of the owner, construed most strongly against the defendant, implied that the employment was made for defendant's benefit, and that he had no authority to make such a contract on behalf of the owner. (Sorenson v. Kribs, 130.)

Principal and Agent—Agent's Authority—Presumption and Burden of Proof.

3. On such implication that defendant employed plaintiff's assignor on his own account to sell the land upon commission, for the payment of which the owner was not bound, Section 799, subdivision 33, L. O. L., raised the presumption that such want of authority continued after an option obtained by plaintiff was declared forfeited, and to overcome such presumption the burden was on defendant to show that authority was thereafter conferred upon him by the owner to engage a broker and to agree to pay him a commission for procuring a purchaser acceptable to the owner. (Sorenson v. Kribs, 130.)

Principal and Agent—Liability of Agent—Unauthorized Act—Action for Damages—Question for Jury.

4. In an action for damages for defendant's misrepresentation of his authority to employ plaintiff's assignor as a broker on behalf of

the owner of land, *held*, that the denial of defendant's motion for a directed verdict was not error. (*Sorenson v. Kribs*, 180.)

PRIVATE WAY.

See Dedication, 4.

PROCESS.

See Summons.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, 1, 2, 3, 9.

PUBLIC LANDS.

Public Lands—Railroad Grant—Title.

1. Act Cong. July 2, 1864, c. 217 (13 Stat. 365), granting land to aid in the construction of the Northern Pacific Railroad, operated as a present grant beginning with the date when the plat of the road was filed in the office of the Commissioner of the General Land Office June 29, 1883, so that *eo instanti* the title of the grantee in all of the land to which the statute applied vested. (*McComas v. Northern Pac. Co.*, 639.)

Public Lands—Swamp-lands—Railroad Grant—"Claim."

2. Under Act Cong. July 2, 1864, granting lands to aid in the construction of the Northern Pacific Railroad free from pre-emption or other claims at the time the line of the road was definitely fixed and a plat filed in the General Land Office, the filing of the swamp-land list by the State of Oregon under act of Congress approved September 28, 1850, c. 84 (9 Stat. 519), applicable to that state by Act March 12, 1860, c. 5 (12 Stat. 3), constituted a "claim" excluding such land from the operation of the railroad grant. (*McComas v. Northern Pac. Co.*, 639.)

Public Lands—Mineral Selections—Statute.

3. Under the express provision of Act Cong. July 2, 1864, granting lands to aid in the construction of the Northern Pacific Railroad, the indemnity in lieu of mineral lands must be taken out of unoccupied agricultural lands. (*McComas v. Northern Pac. Co.*, 639.)

Public Lands—Railroad Grant—Withdrawal—Effect.

4. Under Act Cong. July 2, 1864, granting land to aid in the construction of the Northern Pacific Railroad, and excluding mineral lands and in lieu thereof giving a selection out of unoccupied agricultural lands, the cancellation or rejection of swamp-land list filed by the State of Oregon under Act Cong. Sept. 28, 1850, as extended by Act Cong. March 12, 1860, constituting such a claim as to exclude the land from the railroad grant, would not operate to extend the grant over a disputed tract in the matter of filing indemnity selections. (*McComas v. Northern Pac. Co.*, 639.)

See Adverse Possession, 5.

PUBLIC SERVICE COMMISSION.**Public Service Commissions—Regulation of Rates.**

1. The regulation of rates for the purpose of promoting the public health, comfort, safety and welfare is an exercise of the police power of the sovereign. (*Woodburn v. Public Service Commission*, 114.)

See Telegraphs and Telephones, 1, 2.

QUESTION FOR JURY.

See Assignments, 2.

See Bills and Notes, 5, 9.

See Principal and Agent, 4.

See Statute of Frauds, 1.

QUO WARRANTO.**Quo Warranto—Abolition of Remedy—Substitution.**

1. By Section 363, L. O. L., the writ of *quo warranto* and information in the nature of *quo warranto* have been abolished, but only the forms have been done away with, as the remedies obtainable thereunder are still available by an action at law, prosecuted in the name of the state under the authority of Section 366. (*State ex rel. v. Evans*, 46.)

See Schools and School Districts, 4.

RAILROAD GRANT.

See Adverse Possession, 5.

See Public Lands, 1, 2, 4.

RAILROADS.**Railroads—Operation—Fires—Admissibility of Evidence.**

1. In an action for damages caused by fire alleged to have been set by defendant's locomotive, the rule justifying the admission of evidence of other fires set by defendant's locomotives will not render admissible testimony that twelve days after the fire a witness saw burned-over areas within the right of way; there being no testimony of the passing of engines at or immediately prior to the ignition of a fire. (*Mt. Emily Timber Co. v. Oregon-Wash. R. & N. Co.*, 185.)

Railroads—Operation—Fires—Instruction.

2. In an action for damages caused by fire alleged to have been set by defendant's locomotive, where the evidence did not suggest a deficiency in number of men, and did not bear on the incompetency of mechanics, machinists, fire patrol or laborers, an instruction withdrawing from the jury the consideration of allegations that defendant failed to employ competent or careful mechanics or machinists to repair its engines or to use careful or sufficient fire patrols, section-men or laborers to protect the right of way and adjacent land from fire, was properly given. (*Mt. Emily Timber Co. v. Oregon-Wash. R. & N. Co.*, 185.)

Railroads—Operation—Fires—Instruction.

3. As modern science and ingenuity have not yet reached a point of perfection or state where it is possible to propel steam locomotives

in such manner as to absolutely prevent the escape of sparks of fire, the law does not require of a railroad company more than such reasonable care and diligence as the state of science will admit, nor make it liable for fires caused by the escape of ordinary and usual quantities of sparks while the engine is operated in the ordinary course of business by competent employees. (*Mt. Emily Timber Co. v. Oregon-Wash. R. & N. Co.*, 185.)

Railroads—Operation—Fires—Negligence.

4. In an action for damages caused by fire alleged to have been set by defendant's locomotive, although negligence may be inferred from circumstantial evidence, in order to establish negligence plaintiff must prove by a preponderance of evidence that the fire was communicated by sparks from defendant's locomotive, excluding every other theory as to the cause or origin of such fire. (*Mt. Emily Timber Co. v. Oregon-Wash. R. & N. Co.*, 185.)

See Trial, 6, 7.

REBUTTAL.

See Evidence, 5.

See Witnesses, 2.

RECORD.

See Appeal and Error, 3, 4, 6.

See Bankruptcy, 5.

Transmission of to Appellate Court.

See Criminal Law, 15, 16.

REFORMATION OF INSTRUMENTS.

Reformation of Instruments—Evidence—Sufficiency—Mistake.

1. In a suit to reform a five-year lease of wheat land, one half of which the lessee was to put in crop each year and the other half he was to fallow, evidence held to show that it was agreed by the parties that the lessee should receive a reasonable compensation for fallowing during the last summer of the term that portion of the land which he was not to crop that year, and that the provision was omitted from the lease as written by the scrivener, though the terms of the agreement had been stated to him. (*Bott v. Campbell*, 468.)

Reformation of Instruments—Evidence—Sufficiency—Meeting of Minds.

2. In a suit to reform a lease for mistake, evidence held to show that statements by the parties were not mere negotiations leading up to the making of the agreement, but constituted an agreement on which the minds of the parties met, and which by mistake of the scrivener was not set forth in the written lease, so that such statements were admissible under Section 713, L. O. L., excluding parol evidence varying a written instrument, except where a mistake or imperfection of the writing is put in issue by the pleadings. (*Bott v. Campbell*, 468.)

Reformation of Instruments—Mistake—Degree of Proof.

3. Where one of the parties to a written contract is dead, evidence of a mistake in the contract must be carefully scrutinized, and

found to be convincing and to show clearly the contract and the existence of a mutual mistake. (*Bott v. Campbell*, 468.)

RELIGIOUS SOCIETIES.

Religious Societies—Conveyances—Validity.

1. Land was conveyed to trustees of a religious society which abandoned the premises, and it was thereafter sold by order of the general conference by the "trustees of abandoned church property." *Held*, the conveyance was valid in absence of statute, it being in accordance with church discipline, and compliance with Sections 7177, 7178, L. O. L., relating to powers of trustees being permissive and not mandatory, did not apply. (*Andrews v. Sercombe*, 616.)

REMONSTRANCE.

Sufficiency of Against Public Improvement.

See Municipal Corporations, 9.

REVIEW.

See Appeal and Error, 1, 5, 7, 9, 10, 14, 19, 24, 25.

See Criminal Law, 10, 12.

See Eminent Domain, 1, 2.

ROSEBURG, CHARTER OF.

See *Giles v. Roseburg*, 67.

SALES.

Sales—Conditional Sales—Retaking of Property.

1. Where a conditional sales contract is in the form of a lease with a specified rental and a provision, in event of default in payment, that vendor may resume possession of the chattel and hold the sums already paid as earned rentals, the retaking of the property is a rescission of the contract, relieving the vendee from further obligation. (*International Harvester Co. v. Bauer*, 686.)

Sales—Conditional Sales—Retaking of Property.

2. Where a conditional sales contract reserves title in the vendor with a right in case of default to retake the chattel, sell it at public or private sale, and apply the proceeds in payment of the debt, with an express agreement by the vendee to pay the balance of the purchase price then remaining, retaking the property by the vendor does not relieve the vendee from further obligation. (*International Harvester Co. v. Bauer*, 686.)

See Executors and Administrators, 1-3.

SATISFACTION.

See Execution, 2-4.

SCHOOLS AND SCHOOL DISTRICTS.

Schools and School Districts—Annexation of District—Void Order Calling Election.

1. An order calling an election on the question of whether a school district be annexed to a high school district is void for legal fraud

and lack of jurisdiction if the district boundary board had no information concerning the number of legal voters in the school district except the statements found in the petition and remonstrance, and later developments reveal that the petition did not contain the names of the necessary one third of the legal voters. (State ex rel. v. Evans, 46.)

Schools and School Districts—Consolidation—Legality—Burden of Proof.

2. In a statutory action in the nature of *quo warranto* requiring a district boundary board to show by what authority they acted in consolidating a school district with a union high school district, plaintiffs alleging the annexation was illegal because the requisite number of voters did not sign the petition for an election on the question, defendants must allege all the facts necessary to show that the school district was legally annexed; the burden of proof resting upon them to show that the two districts were legally consolidated. (State ex rel. v. Evans, 46.)

Schools and School Districts—Consolidation—Petition—Election—Statute.

3. Under Section 4194, L. O. L., relative to elections to unite school districts for high school purposes, an election on the question of whether a school district be annexed to a union high school district was void, and the attempted annexation came to naught, unless the petition for the election from the school district was signed by not less than one third of the legal voters, the petition being jurisdictional and no petition at all unless in conformity with the statute. (State ex rel. v. Evans, 46.)

Schools and School Districts—Consolidation—Attack by Quo Warranto—Evidence *Dehors* the Record.

4. In *quo warranto* against a district boundary board demanding that it show by what authority it ordered the consolidation of a school and a high school district, complainants claiming that the annexation of the school district was not legal because the petition for the election on the question was not signed by the requisite number of voters, complainants could offer evidence *dehors* the record that the petition was not signed by the requisite number, the petition and order for election not of themselves proving the sufficiency of the petition. (State ex rel. v. Evans, 46.)

Schools and School Districts—High Schools—"Expended."

5. Under Laws of 1915, Chapter 235, page 330, Section 4, providing that the cost of educating a high school pupil shall be determined by dividing the total amount expended by the high school district for maintaining high schools during any school year by the average daily attendance, etc., as "expended" means "paid out," an estimate for a high school district, submitted to the county school superintendent as required by Section 2, properly included an item for repairs, but not items for depreciation of a school building or interest on money expended in construction of the building. (School Dist. No. 24 v. Smith, 443.)

SECONDARY EVIDENCE.

See Evidence, 2, 3.

SEEPAGE.

See Waters and Watercourses, 5, 6.

SESSION LAWS OF OREGON.

See Table in Front of this Volume.

SHIPPING.

See Carriers, 1-8.

SPECIFIC PERFORMANCE.**Specific Performance—Oral Contract—Possession.**

1. It is possession of real property, and, when any relation of affinity or consanguinity exists between parties, also the improvements made upon the land by the purchaser pursuant to the vendor's oral agreement to sell and convey, that takes the case out of the statute of frauds and authorizes a court of equity to decree a specific performance. (*Skinner v. Furnas*, 414.)

Specific Performance—Complaint—Possession and Improvements.

2. Since an oral agreement and its part performance are the essentials to be established by evidence at the trial of a suit for specific performance, it is necessary that the complaint therein set forth the oral agreement and allege that possession was taken by the purchaser pursuant thereto, and that, if the parties are related, the latter has made improvements on the land. (*Skinner v. Furnas*, 414.)

Specific Performance—Purchase by Wife—Sufficiency of Evidence.

3. In a suit by a married woman for specific performance of an oral contract to sell and convey land, evidence *held* to establish the allegation of the complaint that she was the purchaser under the contract. (*Skinner v. Furnas*, 414.)

Specific Performance—Oral Agreement—Mutuality.

4. Mutuality must exist when the aid of the court is invoked to enforce the rights of the parties to an oral contract for the sale of land, and where a recovery of the consideration and the execution of a deed could have been granted to either party when suit was begun, the oral contract was not wanting for mutuality. (*Skinner v. Furnas*, 414.)

Specific Performance—Oral Agreement—Estoppel.

5. A married woman should not be denied specific performance of an oral contract to sell land because she permitted her husband to hold the legal title in trust for her, where defendants did not rely upon the husband's apparent legal title. (*Skinner v. Furnas*, 414.)

See Pleading, 9.

STATUTE OF FRAUDS.**Frauds, Statute of—Jury Question.**

1. In an action for brokerage fees, where a written agreement by the owner to pay brokerage fees was supplemented by telegrams and a letter, *held*, that under the evidence it was a question for the jury

whether there was a sufficient memorandum within the statute of frauds (Section 808, L. O. L.), declaring that an agreement authorizing or employing a broker to sell real estate for compensation or commission shall not be effective unless in writing. (*Hewey v. Andrews*, 448.)

STATUTE OF LIMITATIONS.

See Limitation of Actions, 1.

STATUTES.

Statutes—Construction—Intention of Legislators.

1. Where the language of the lawmakers is plain and their intent clear, such meaning must be given effect. (*Clayton v. Enterprise Electric Co.*, 149.)

Statutes—Validity—Title.

2. The provision of the law protecting the general public is not foreign to nor disconnected with the subject embraced in the title. The title was sufficient to direct the voters' attention to the measure to be acted upon, was not inconsistent with the general object and purpose of the initiative and referendum amendments to the constitution, and the statute is not invalid under Article IV, Section 20, of the Constitution. (*Clayton v. Enterprise Electric Co.*, 149.)

Statutes—Validity—Title.

3. To render a portion of a statute invalid because its provisions are not embraced within the title, as required by Article IV, Section 20, of the Constitution, the provisions must be entirely disconnected with the subject, wholly incongruous, and consist of matter of which the title gives no notice, so that the adoption of the measure by means of the title would be fraudulent. (*Clayton v. Enterprise Electric Co.*, 149.)

See Appeal and Error, 2, 12.

See Constitutional Law, 4.

See Counties, 1, 2.

See Criminal Law, 7, 13.

See Death, 1.

See Dedication, 3.

See Dower, 1.

See Drains, 1, 2.

See Electricity, 1.

See Execution, 4.

See Fraudulent Conveyances, 2.

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See Mechanics' Liens, 1.

See Municipal Corporations, 8, 11-13.

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See Quo Warranto, 1.

SUMMONS.

Service on One of Unsound Mind.

See Insane Persons, 1.

SWAMP-LANDS.

See Courts, 1.

See Public Lands, 2.

TAXATION.**Taxation—Private Purpose.**

1. No tax can be imposed for a private purpose. (*Stevenson v. Port of Portland*, 576.)

Taxation—Subject—"Public Purpose."

2. The "public purpose" for which the government may levy taxes is one which concerns its own people, and not some other people having a government of its own, for whose wants taxes are laid, and must pertain to the sovereignty with which the tax originates; the essential requisite being that a public service or use shall affect the inhabitants as a community, and not merely as individuals. (*Stevenson v. Port of Portland*, 576.)

Taxation—Public Purpose—Custom and Usage.

3. Custom and usage may be important factors in determining whether a tax is for a public or private purpose; but, while recognizing the influence of customs and usages already established, the courts are mindful of the fact that new customs and usages may prevail, and that conditions may change, so that a purpose, formerly private, may become public. (*Stevenson v. Port of Portland*, 576.)

TELEGRAPHS AND TELEPHONES.**Telegraphs and Telephones—Regulation by Municipality—Regulation by State.**

1. Where a municipality under its home rule charter, adopted under Article XI, Section 2, of the Constitution, granted a telephone franchise limiting rates to be charged, and later the Public Utility Act (Laws 1911, p. 483), was enacted, the Public Service Commission had authority thereunder to authorize the company to charge higher rates. (*Woodburn v. Public Service Commission*, 114.)

Telegraphs and Telephones—Regulation—Public Service Commission.

2. The failure of the Public Service Commission to file a statement of valuation mentioned in Section 10 of the Public Utility Act (Laws 1911, p. 483), does not affect the validity of an order, allowing a telephone company to charge higher rates than those stated in its franchise, since the right to make the order does not depend upon filing the statement of valuation, and, in any event, under direct provision of Section 75 of the act, technical omissions are immaterial. (Woodburn v. Public Service Commission, 114.)

See Constitutional Law, 2.

See Municipal Corporations, 5.

See Public Service Commissions, 1.

TENANCY IN COMMON.**Tenancy in Common—Adverse Possession—Sufficiency of Evidence.**

1. In suit between cotenants, to set aside a decree and to partition real property, evidence *held* insufficient to substantiate defendants' allegation of title by adverse possession with the degree of certainty required between tenants in common. (St. Martin v. Hendershott, 58.)

Tenancy in Common—Possession of Cotenant—Presumption.

2. Possession by one tenant in common is presumed to have been in the interest of all others. (St. Martin v. Hendershott, 58.)

TENDER.**Tender—Mode and Sufficiency—Pleading.**

1. A defendant relying on a plea of tender must show that he had at time of tender, and still has, the means of making the tender good. (Short v. Rogue River Irr. Co., 662.)

TIME.**Time—Computation—Days—Statute.**

1. Under Section 531, L. O. L., providing that the time within which an act is to be done shall be computed by excluding the first day and including the last, etc., the filing of an initiative petition and proposed ordinance completed on November 4, 1916, to be acted upon at the election of December 4, 1916, having been filed only 29 days before December 4, 1916, did not comply with an ordinance requiring such petition to be filed 30 days before the election at which a proposed ordinance or amendment to the city charter is to be submitted or referred. (State ex rel. v. Macy, 81.)

Time—Computation—Sunday.

2. Where the last day for perfecting appeal fell on Sunday, notice was properly filed the next day, under Section 531, L. O. L., as to computation of time. (Hewey v. Andrews, 448.)

See Appeal and Error, 4, 6, 12, 13.

See Joint Ventures, 1, 2.

In Which to Serve Notice of Appeal.

See Appeal and Error, 2.

Extending Time for Completion of Street Improvements.
See Municipal Corporations, 3.

TITLE.

See Statutes, 2, 3.

Color of Title.

See Adverse Possession, 4.

To Swamp-land.

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Purchaser at Sheriff's Sale.

See Mortgages, 1.

To Railroad Grant.

See Public Lands, 1.

TRADE NAME.

See Partnership, 4.

TRANSCRIPT.

See Appeal and Error, 3, 4.

TRIAL.

Trial—Instructions—Form of Instructions.

1. An instruction submitting an issue to the jury need not follow the testimony of the witnesses if it accurately presents the situation. (Doerstler v. First Nat. Bank, 92.)

Trial—Instructions—Issues Presented.

2. Where a depositor in a national bank sued for deposits which had been loaned by the president, contending that the president was acting for the bank, while the bank contended that the president was acting individually, and that the depositor was estopped to assert liability against it, an instruction on the powers of national banks is not necessary; for the fact that the depositor attempted to authorize the bank to perform an *ultra vires* act in lending his money did not authorize the president to appropriate the funds and excuse the bank from liability for his misappropriation. (Doerstler v. First Nat. Bank, 92.)

Trial—Instructions—Assumption of Facts.

3. In an action against a national bank to recover deposits, the bank contended that the depositor consented to the act of the president in loaning his deposits, and that he was estopped to assert the liability of the bank. The court charged that an estoppel is that by which a person by his own act which he has committed precludes him from asserting the truth. Other portions of the charge clearly showed that the court did not assume that plaintiff's testimony at trial was true, and that the statement on which the estoppel was based was untrue. *Held*, that the charge was not erroneous as assuming that plaintiff's testimony at trial was true. (Doerstler v. First Nat. Bank, 92.)

Trial—Requested Instructions—Given Instructions.

4. In such action, there was no error in refusing to give defendant's instruction omitting the matter of a renewed or subsequent employment, where its substance was embraced in the instruction given. (*Sorenson v. Kribs*, 130.)

Trial—Instructions—Requests—Applicability.

5. No error is committed in denying a requested instruction, which does not correctly announce the law applicable to the case, though such request may call the court's attention to a particular matter not covered by the general charge. (*Sorenson v. Kribs*, 130.)

Trial—Operation of Railroads—Fires—Instructions.

6. In an action for damages caused by fire alleged to have been set by defendant's locomotive, an instruction complained of, taken with another given instruction, *held* to put the question of care required of defendant in procuring and utilizing appliances to prevent the escape of fire from its locomotives fairly before the jury and to enjoin the proper degree of care upon the defendant. (*Mt. Emily Timber Co. v. Oregon-Wash. R. & N. Co.*, 185.)

Trial—Degree of Proof—Instructions.

7. Under Section 688, L. O. L., providing that the law does not require a degree of proof beyond moral certainty or that degree of proof which produces conviction in an unprejudiced mind, and Section 868, subdivision 5, making it the duty of the court to instruct that in civil cases the affirmative of the issue shall be proved, and the finding on contradictory evidence shall be according to the preponderance, in an action for damages for fire alleged to have been caused by defendant's locomotive, an instruction that the law does not require absolute proof or absolute certainty and is satisfied when a jury of unprejudiced minds, after hearing the testimony, have an abiding conviction of the truth of the claim, and that it is incumbent upon plaintiff to prove the same by a preponderance of competent evidence, was proper. (*Mt. Emily Timber Co. v. Oregon-Wash. R. & N. Co.*, 185.)

Trial—Trial by Court—Effect of Findings.

8. The findings of the court, made without intervention of jury, have the force and effect of a verdict. (*Morris v. Leach*, 509.)

Trial—Instructions—Construction—Reference to Other Instructions.

9. An instruction which conveys a proper meaning when read with other instructions given is not error. (*Snow v. Beard*, 518.)

Trial—Denial of Nonsuit—Cure of Error.

10. The denial of a motion for nonsuit at the close of plaintiffs' case will not be disturbed when the omission, if any, is subsequently supplied by either party. (*McCully v. Heaverne*, 650.)

Trial—Instructions.

11. Refusal of a requested instruction covered by given instructions is not error. (*Barnhart v. North Pacific Lumber Co.*, 657.)

Trial—Instructions—Cure by Other Instructions.

12. In a servant's action for injuries, where the court made it clear in another part of the charge that the Employers' Liability Act (Laws

1911, p. 16) only requires the use of practicable devices and precautions, the defendant cannot complain that the court omitted the element of practicability from two of the instructions. (*Barnhart v. North Pacific Lumber Co.*, 657.)

Trial—Cautionary Instruction—Discretion of Court.

13. The giving of cautionary instruction is within the discretion of the court. (*Barnhart v. North Pacific Lumber Co.*, 657.)

See Criminal Law, 9, 11, 21.

TRUSTS.

See Executors and Administrators, 2.

Duty of Trustee Under Trust Deed.

See Mortgages, 2-4.

UNITED STATES STATUTES.

See Tables in Front of this Volume.

VACATION.

See Judgment, 1, 2.

VARIANCE.

See Pleading, 3, 4.

VENDOR AND PURCHASER.

Vendor and Purchaser—Possession—Selection.

1. Where a purchaser takes possession of land by an indicated boundary, his right to the premises vests upon the selection. (*Skinner v. Furnas*, 414.)

Vendor and Purchaser—Construction of Contract—"More or Less."

2. Where a contract for the purchase of land described it by meter and bounds and ended "containing 32 acres more or less," the plain meaning of the words "more or less" is that the parties are to run the risk of gain or loss, and if there is only a trifle less than 32 acres, the shortage is not material. (*Andrews v. Sercombe*, 616.)

VENUE.

Venue—Mandamus will not Lie to Control Judicial Discretion.

1. Under Section 613, L. O. L., *mandamus* is a proper remedy to require action by an inferior court in the discharge of its functions, but not to control judicial discretion. (*Best v. Parkes*, 171.)

Venue—Foreclosure of Lien.

2. Under Section 396, L. O. L., providing that suits in equity for the foreclosure of a lien on real property must be tried in the county where the property is situated, the trial court had no jurisdiction to foreclose plaintiff's lien on real property situated outside of the county. (*First Nat. Bank v. Courtright*, 490.)

VERDICT.

See Attorney and Client, 4.
See Master and Servant, 1.

WAIVER.

See Eminent Domain, 1, 2.
See Mechanics' Liens, 2, 6, 7.

Demand for Payment and Presentment of Note Waived.

See Bills and Notes, 17.

WARRANTY.**Action for Damages Against Agent on Implied Warranty.**

See Principal and Agent, 1, 2.

WATERS AND WATERCOURSES.**Waters and Watercourses—Appropriation for Irrigation—Desert Land Act.**

1. Under the Desert Land Act, Act Cong. March 3, 1877, c. 107 (19 Stat. 377, U. S. Comp. Stats. 1901, p. 1548), which provides that all surplus water over and above the actual appropriation and use for reclamation of desert land under the act, "together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation," etc., subject to existing rights, a defendant, whose title was derived from patent from the United States government by virtue of a homestead entry, and who had made no appropriation of water from a stream upon which his land had bordered since 1877, could not, by reason of the mere abuttal upon the stream, defeat or diminish a prior appropriation made under the act. (Hill v. American Land & Livestock Co., 202.)

Waters and Watercourses—Appropriation for Irrigation—Evidence—Sufficiency.

2. In a proceeding to determine riparian rights, evidence held to support a finding that a defendant had never, by ditches or otherwise, used or appropriated water for irrigation purposes from an abutting stream, except seepage water escaping from another irrigation system. (Hill v. American Land & Livestock Co., 202.)

Waters and Watercourses—Appropriation for Irrigation—Right to Use of Waste Water.

3. It being the duty of an appropriator of water for irrigation to use ordinary methods to prevent waste, while a temporary use may be made of seepage water, allowed to escape by excessive use of water, by anyone who may capture it, no permanent right can be acquired to compel the continuance of the discharge or loss. (Hill v. American Land & Livestock Co., 202.)

Waters and Watercourses—Appropriation for Irrigation Proceedings—Pleading—Misjoinder of Parties Plaintiff.

4. Under Section 393, L. O. L., providing that "all persons having an interest in the subject of a suit, and in obtaining the relief de-

manded, may be joined as plaintiffs, except as * * otherwise provided"; and that "any person may be made a defendant who has or claims an interest * * adverse to the plaintiff, or who is a necessary party to a complete determination * * of the questions involved," in a proceeding to determine riparian rights to water for irrigation purposes, the thing in controversy being the whole mobile flowage of the stream, and no adequate determination being possible without the presence of all interested in the entire flowage, the joinder of a plaintiff who claimed riparian rights on the stream was proper. (*Hill v. American Land & Livestock Co.*, 202.)

Waters and Watercourses—Seepage—Injunction—Burden of Proof.

5. One suing to restrain the maintenance of a water corporation's ditch across his land, because seepage therefrom was injuring the land, has the burden of proving that the water which injured the land had escaped from defendant's ditch. (*Taylor v. Farmers' Irr. Co.*, 701.)

Waters and Watercourses—Seepage—Injunction—Evidence.

6. In a suit to enjoin the maintenance of a water corporation's ditch across plaintiff's land, evidence as to the construction and maintenance of the ditch, and of seepage therefrom as the cause of the injury, held not to entitle plaintiff to the extraordinary remedy of injunction. (*Taylor v. Farmers' Irr. Co.*, 701.)

WILLS.

Wills—Liability of Legatees—Debt of Decedent—What Law Governs.

1. Where a note was payable in Colorado and the will of the maker, whereby defendants became residuary legatees, was probated in that state, the payee's right of action, if any, to subject property in the hands of the legatees to the payment of the note arose in Colorado, and was governed by its law. (*Rainey v. Rudd*, 461.)

Wills—Liability of Legatee—Common Law.

2. At common law, no action can be maintained against a legatee upon a contract made by the decedent, as the legatee takes the property only after it has passed from the administrator or executor, in whose hands alone it is liable for the debts of the decedent. (*Rainey v. Rudd*, 461.)

Wills—Liability of Legatee—Action on Note—Complaint.

3. Under Section 488, L. O. L., making legatees liable to a suit in equity by a creditor of the testator to recover the value of any legacy received by them, and providing plaintiff shall not recover unless he shows that no assets were delivered by the executor or administrator to the next of kin, that the value of such assets has been recovered by some other creditor, or that such assets are not sufficient to satisfy his demand, the complaint, in an action on a note against the legatees under the will of the maker, silent as to the statutory prerequisites, was demurrable. (*Rainey v. Rudd*, 461.)

See Descent and Distribution, 1.

WITNESSES.

Witnesses—Cross-examination—Impeachment.

1. Defendant's witness was properly questioned on cross-examination as to a purported conversation in which the witness was sup-

posed to have advised the codefendant, wife of deceased, that she and defendant would be arrested, separated, and each misled into thinking that the other had confessed and advising her and requesting another to remain silent as to such advice. (State v. Branson, 377.)

Witnesses—Impeachment—Rebuttal.

2. Where defendant's witness on cross-examination denied statements advising codefendant, wife of deceased, that she and defendant would be arrested, separated and misled into believing each had confessed, evidence in rebuttal that such statements were made was admissible. (State v. Branson, 377.)

WOODBURN, CHARTER OF.

See Woodburn v. Public Service Commission, 114.

WORDS AND PHRASES.

"Agent"—See Meyers v. Strowbridge Estate Co., 29.

"Any"—See Rose v. Port of Portland, 541.

"Bad Faith"—See Everding & Farrell v. Toft, 1.

"Claim"—See McComas v. Northern Pacific Co., 639.

"Class"—See Anderson v. Stayton State Bank, 357.

"Cruelty"—See Belmont v. Belmont, 612.

"Direct Attack"—See Lieblin v. Breyman Leather Co., 22.

"Discharge of Indorser"—See Everding & Farrell v. Toft, 1.

"Entice"—See State v. Norris, 680.

"Estoppel"—See Daerstler v. First Nat. Bank, 92.

"Expended"—See School Dist. No. 24 v. Smith, 443.

"Holder in Due Course"—See Everding & Farrell v. Toft, 1.

"Joint and Several Notes"—See Anderson v. Stayton State Bank, 357.

"More or Less"—See Andrews v. Sercombe, 616.

"Negligence"—See Everding & Farrell v. Toft, 1.

"Person"—See Frazier v. Cottrell, 614.

"Primarily Liable"—See Everding & Farrell v. Toft, 1.

"Procure"—See State v. Norris, 680.

"Public Purpose"—See Stevenson v. Port of Portland, 576.

"Referendum"—See Rose v. Port of Portland, 541.

"Secondarily Liable"—See Everding & Farrell v. Toft, 1.

"Solicit"—See State v. Norris, 680.

"Trial"—See Hillsboro Nat. Bank v. Garbarino, 405.













